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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. ~~1161~~ 67

JOHN W. TERRY, *et al.*,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

The petitioners, John W. Terry and Richard D. Chilton, pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio, made and entered by said Court on the 19th day of October, 1966 (a copy of which is printed in Appendix A, *infra,* page 17) which dismissed the petitioners' appeals and thereby affirmed the Ohio Court of Appeals and the convictions of these petitioners who had been convicted and sentenced by the trial court.

OPINIONS OF THE COURTS BELOW.

The opinion of the trial court, that is, the Court of Common Pleas of Cuyahoga County, is officially reported as *State v. Chilton, et al.*, 95 Abs. 321 (September 22, 1964). This opinion is printed herein in Appendix B, *infra,* page 17.

The opinion of the Court of Appeals for Cuyahoga County, Ohio, which affirmed the convictions of the peti-

tioners by the trial court, is officially reported as *State v. Terry*, 5 Ohio App. (2d) 122; 214 N. E. (2d) 114; 34 O. O. (2d) 237 (February 10, 1966), and is printed herein as Appendix C, *infra*, page 21.

The Supreme Court of Ohio did not render any formal opinion in dismissing the petitioners' appeals, sua sponte, on the ground that no substantial constitutional question was involved.

JURISDICTION.

The judgment of the Supreme Court of Ohio was entered on the 19th day of October, 1966. Upon petitioners' timely application, the time within which petition for certiorari might be filed was extended by this Court from January 17, 1967 to March 18, 1967. (See Appendix D, *infra*, page 34.) The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257(3), since rights, privileges and immunities under the United States Constitution are claimed to have been violated.

QUESTIONS PRESENTED.

I.

Where the trial court makes a finding that the arrest of the petitioners was unlawful, does the introduction of evidence against the petitioners, which was obtained as a result of the illegal arrests, violate the Fourth and Fourteenth Amendments to the United States Constitution.

II.

Where evidence has been seized from the person of the petitioners as the product of an illegal search and seizure, whether the refusal of the court to apply search and seizure law, and the substitution therefor of a stop and frisk doctrine, is a violation of the Fourth and Fourteenth Amendments to the United States Constitution.

III.

Where no emergency exists, and in the absence of probable cause, can a police officer acting upon bare suspicion alone stop, frisk, and search petitioners for a gun on the street, and can the Court of Appeals justify such conduct by substituting a standard of "reasonably suspects" for the "probable cause" set forth in the Fourth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED.

The pertinent portions of the United States Constitution are set out below:

Amendment IV.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment XIV.

"* * * Nor shall any state deprive any person of life, liberty or property without due process of law * * *."

STATUTE INVOLVED.

Ohio Revised Code Section 2923.01 is set out herein as Appendix E, *infra*, page 35.

STATEMENT OF CASE.

Petitioners herein were indicted, tried, convicted and sentenced to the Ohio State Penitentiary for the offense of Carrying a Concealed Weapon.

Prior to the trial, the Court conducted a hearing on petitioners' pre-trial motions to suppress the evidence, to-wit: guns. The entire testimony on the motions to suppress consisted of the testimony of one police officer. The State's entire case also consisted of the testimony of this one police officer. The Court overruled petitioners' motions to suppress (R. 94, *et seq.*) and upon trial permitted into evidence, the guns, shells, and the testimony of the police officer relating to custodial conversation with the petitioner, Richard Chilton, in the jail house.

The police officer called to testify on both the motions to suppress and the trial testified that his name was Martin McFadden; that he had been a police officer for 39 years and four months; and that he had been assigned to the Detective Bureau for 35 years.

He further testified that on the 31st day of October, 1963, he first observed one John Terry and one Richard Chilton standing at the corner of Huron Road and Euclid Avenue where these two streets intersect at East 13th Street in the City of Cleveland. That it was 2:00 or 2:30 p.m., and that it was broad daylight. After observing these two colored males standing at the corner talking, he positioned himself in the lobby of Rogoff's store, near 14th Street on Huron Road, for the purpose of further observation. During a period of some 10 to 12 minutes, he observed that one male would stand at the corner while the other one would walk up Huron Road. That this male would stop and look into either the Diamond Store or the United Airlines Office for a second or so and then continue west on Huron Road near Halle Brothers store. He would

then turn around, come back to the spot where the stores were, peer in the window, and go back to the corner where he would talk with the waiting male. Then the man who had been waiting would go through this same procedure. The testimony with reference to the number of trips each man made varied from two to three times each to four to five times apiece. (R. 14, 22, 24.)

During this 10 to 12 minute period of observation, the officer stated that he saw a short white man come over to the corner, converse with these two colored males for a minute or so, and then walk west on Euclid.

He then observed the two colored males walk west on Euclid Avenue in a natural manner, and at Zucker's store, 1120 Euclid Avenue, he saw them stop in front of this store and again converse with the same white male.

The officer further testified that these three men were just standing in front of the store with their backs to the display window; that they were just talking; and that he approached them and stated that he was a police officer. He said that he asked them their names and that "they gave it to me quick." (R. 17) (At all other places in the record he says "they mumbled something.") Then without any further conversation between the officer and these men, and no overt act on the part of the men, the police officer conducted himself as follows:

> "A. * * * I got Chilton then, not Chilton but Terry, and I turned him around and I stood in the back of them, and I searched them, and in his upper left hand pocket of his topcoat I felt a gun and I went in for it and I had a tough time getting it, so I took the coat off. I at that time informed them, the three of them, to keep their hands out of their pockets and walk into the store. When they got into the store I told them to face the wall, keep their hands away, and on searching Chilton in his left hand pocket of his top-

coat I found a gun, a '38; and searching Katz I found nothing." (R. 16, 17.)

The three men were then taken to the Cleveland Police Station where they were booked for "Investigation." A day or so later, Terry and Chilton were charged with "Carrying a Concealed Weapon," a felony, and Katz was charged with "Being a Suspicious Person," a misdemeanor.

The officer admitted that there were people on the street when this matter occurred and that the stores were open and that there was business as usual in the downtown area. He admitted that he did not know any of these men (R. 44, 119); that no one had furnished him any information regarding them (R. 43, 44, 119); and that his reason for watching them was that "they didn't look right to me at the time." (R. 119) With reference to his reason for approaching the men in front of Zucker's and turning Terry around and patting him down, the officer testified as follows: "In the first place I didn't like their actions on Huron Road, and I suspected them of casing a job, a stick-up. That's the reason." (R. 42) He said that he patted them down "* * * to see what they had, if they had guns." (R. 42) However, he testified under inquiry by the Court that in 39 years as a police officer and 35 years as a detective, that he had no experience in observing individuals casing a place and had never observed anybody casing a place. (R. 46)

ARGUMENT RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

Where an arrest is unlawful, evidence seized as a result thereof and used at the trial violates the Fourth and Fourteenth Amendments.

When the police officer in this case approached the petitioners and the third man, without probable cause, and subjected Terry to his domination, an arrest occurred. Upon turning Terry completely around for the purpose of beginning his frisk the police officer had then and there arrested Terry without probable cause.

The trial court was therefore correct in making its findings that the arrest in this case was not legal. (R. 96, 100.) It was, therefore, incumbent upon the Court to suppress the evidence which was the product of an illegal search and seizure and the failure to suppress was in violation of the Fourth and Fourteenth Amendments. *Mapp v. Ohio*, 367 U. S. 643 (1961.)

It is our contention that this Court should render an appropriate opinion which would declare that the police cannot, in the absence of probable cause, stop and frisk, and as a result thereof acquire probable cause to arrest.

In *Ker v. California*, 374 U. S. 23 (1963), which was relied upon by the trial court as authority for a state being able to establish its own rules and standards pertaining to search and seizure, this Court nevertheless emphatically ruled that:

> "We reiterate that the reasonableness of a search is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case and in light of the 'fundamental criteria' laid down by the Fourth Amendment and

in opinions of the Court applying that Amendment. Findings of reasonableness, of course, are respected only insofar as consistent with Federal constitutional guarantees."

This Court has never considered the question which this case presents, i.e., whether there is a distinction between stopping and frisking, and search and seizure. It is our contention that there is no such distinction, and that regardless of the generic term used, i.e., "frisk," "tap," "pat," or "search," the result is a search, and a search incident to an unlawful arrest is constitutionally prohibited. If one "taps," "pats," or "frisks," for narcotics or policy slips, and the finding of them is an illegal search, then if one "taps," "pats," or "frisks," for a gun, and finds it, it is still an illegal search. (But cf. Trial Court's opinion, App. B at page 19). The product of the search is not dispositive of its nature.

The basic principles set forth in *Ker v. California, supra,* which this Court gave to the States to guide them, would foreclose the establishment by the States of standards below the minimal ones required by the Fourth Amendment. Therefore the use of *Ker v. California, supra,* by the States, to justify the recognition of a standard known as "reasonably suspects" in order to avoid the application of search and seizure law as set forth in *Mapp v. Ohio, supra,* and *Beck v. Ohio,* 379 U. S. 89 (1964) involves a misreading of *Ker* and is clearly violative of the standards set forth in the Fourth Amendment.

In light of the interpretation being given to *Ker,* id., by State of Ohio and other states (see *People v. Rivera,* 14 N. Y. (2d) 441 (1964) Cert. Den. 379 U. S. 978 (1965)), it is necessary that this Court examine the exception now being established. By declaring that "stopping" and "frisk-

ing" to acquire probable cause is not constitutionally permissible, *Ker* will be vindicated. The portion of *Ker*, id., which is being circumvented is:

> "The evidence at issue, in order to be admissible, must be the product of a search incident to a lawful arrest, since the officers had no search warrant. The lawfulness of the search without warrant, in turn, must be based upon probable cause, which exists where the facts and circumstances within their (the officers) knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Brinegar v. United States*, 338 U. S. 160, 175-176 (1949), quoting from *Carroll v. United States*, 276 U. S. 132, 162 (1925); accord, *People v. Fischer*, 49 Cal. 2d 442, 317 P. 2d 967 (1957); *Bompensiero v. Superior Court*, 44 Cal. 2d 178, 281 P. 2d 250 (1955)."

II.

The substitution of a "stop and frisk" doctrine for "probable cause" violates the Fourth and Fourteenth Amendments.

In considering whether the officer had probable cause for arrest, these excerpts from his testimony are of prime importance:

1. When asked at what point he considered their actions unusual, his reply was (R. 118):

> "Well, to be truthful with you, I didn't like them. I was just attracted to them, and I surmised that there was something going on when one of them left the other one and did the walking up, walk up past the store and stopped and looked in and came back again."

2. At R. 119:

> "Q. You didn't know either one of these men did you?

A. I did not.

Q. And no one had furnished you any information with regard to these two men, have they?

A. Absolutely no information regarding these two men at all. I am telling the truth when I say that."

3. At R. 121:

"Q. Now when you saw this white man come over and talk to the two of them, there at the corner of Huron and 14th, did you know this white man?

A. No, I didn't.

Q. You had no information with reference to this white man?

A. No information on anything that I—on anything that I seen, anything that I seen I had no information whatsoever on."

4. At R. 129-134:

"Q. Well, you tell the court as you walked through the door you said 'Order the wagon' and as you further say you were then arresting Chilton, Terry and Katz—

A. That's right.

* * * * *

Q. What were Chilton and Katz being arrested for?

A. Association.

Q. Is that your complete answer, sir?

A. Well, they were found in company with a man with a revolver.

Q. So then at that point they were being arrested for association?

A. They were being arrested, yes, period.

Q. Do you know of any charge under Ohio Law entitled 'Association'?

* * * * *

A. As far as I know, I don't know."

5. At R. 45:

"Q. But when you walked up to these men and you first spoke to them you did not know that these men had guns on them, did you?

A. Absolutely not."

The above colloquy demonstrates the absence of probable cause for arrest.

The after-the-event justification does not create probable cause. An arrest without a warrant by-passes the safeguards provided by an objective predetermination of probable cause. It substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment. *Beck vs. Ohio, supra,* 142; *Wong Sun vs. United States,* 371 U. S. 471, 479, 480 (1963).

This Court has already made it clear that good faith on the part of the arresting officer is not enough. *Beck vs. Ohio, supra; Henry vs. United States,* 361 U. S. 98, 102 (1959). An Ohio case in point is *Rasey, et al. vs. Ciccolino, Admx.,* 1 Ohio App. 194; 18 C. C. (NS) 331; 24 C. D. 294 (1913).

In justifying the application of the "stop and frisk" distinction, the trial Court in the present case said, "Had he gone into their pockets and obtained evidence, as an example, narcotics or illegal slips, there would be no question of an illegal search and seizure." (R. 98.) This rationale justifying a search because the fruit is a pistol as distinguished from narcotics or illegal slips cannot survive the proscription against mere evidential searches established in *Gouled v. United States,* 255 U. S. 298 (1921). And in any event, a valid search must be by warrant issued upon probable cause or incidental to a valid arrest.

Even suspicious conduct alone does not subject a person to loss of his immunity from search of his person, and exempt him from inclusion in the Fourth Amendment. *U. S. v. DiRe*, 332 U. S. 481 (1948); *People v. Henneman*, 367 Illinois 151 (1937); *People v. Ford*, 356 Ill. 572, 191 N. E. 315 (1934); *People v. Macklin*, 353 Ill. 64, 186 N. E. 531 (1933).

This Court in its decisions on illegal searches and seizures has never recognized a special search known as "a frisk," exempt from the Fourth Amendment requirements. Such a distinction, without a difference, poses a new and unique problem for citizens, by subjecting them to search and seizure based upon suspicion alone.

III.

Substituting a standard of "reasonably suspects" for "probable cause" violates the Fourth and Fourteenth Amendments.

In this case, we are confronted with an unusual position being taken by an inferior court prior to review by this Court. The Ohio Court of Appeals stated in its opinion (Appendix C at pages 32-33) that:

> "* * * even if the Supreme Court would hold that federal officers may not inquire into suspicious street activities or frisk in the absence of probable cause to arrest, this does not necessarily invalidate the applicable state rules. There is no mandate in the Mapp opinion that the states henceforth must abide by all the interpretations of the federal courts."

In light of this pronouncement it would seem necessary for this Court to rule that the establishment of lesser standards to escape the dictates of the Fourth Amendment will not be tolerated whether committed by federal officers or State officers.

The Court of Appeals took the same position as the trial Court took respecting the arrest, i.e., that the arrest did not take place until the petitioners were ordered into the store (Appendix C, at page 31); however, they noted that even if the arrest took place as petitioners contend, that it does not follow that the evidence must be suppressed. This Court then is confronted with a situation in which policemen are permitted to stop citizens on the street, turn them around, and frisk them in public view, without an arrest occurring. If this illegal search of the person yields a product, e.g., a gun, the illegal yield is used to supply probable cause for arrest.

The lower appellate court also distinguishes *Henry v. United States,* 361 U. S. 98 (1959) from the instant case by virtue of the fact that the government conceded in that case that the arrest took place the moment the car in which Henry was riding was stopped by the federal agents. The Court then justified its holding on the basis that this police officer in the instant case "reasonably suspected" that the defendant was "casing" a store with robbery in mind, that it was therefore logical for him to presume that the defendant was armed, and the finding of the gun therefore justified the frisk and gave him "probable cause" to arrest.

We would urge this Court to examine this case in accordance with its statement in *Beck v. Ohio, supra*:

> "* * * While the Court does not sit as in nisi prius to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the state court findings, such as a finding as to the reasonableness of a search and seizure, the constitutional criteria established by the Supreme Court have been respected."

An examination of the facts and applicable law in this case will clarify the issue as to when an arrest occurs. This issue has never been squarely met by decision of this Court. Petitioners' contention is that when a person is lawfully arrested, the police have a right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime. *Beck v. Ohio,* id., *Weeks v. United States,* 232 U. S. 383, 392 (1914); *Agnello v. United States,* 269 U. S. 20, 30 (1925). However, it is equally clear that in the absence of a lawful arrest, there is no right to search even for weapons. Likewise, the appeal to necessity and the exigency of the situation should not be available to a police officer to protect an arrest which is not valid, or to secure evidence for which he was not entitled to search.

CONCLUSION.

We urge this Court to grant certiorari and to announce as fundamental to due process, that:

1. The product resulting from a "stop and frisk" based upon suspicion cannot be used to provide the probable cause for an arrest without contravening the Fourth and Fourteenth Amendments.

2. The substitution of a doctrine of "stop and frisk" and the refusal to apply search and seizure law to the product of an illegal search and seizure is in violation of the Fourth and Fourteenth Amendments to the United States Constitution.

3. The substitution of a standard of "reasonably suspects" for "probable cause" set forth in the Fourth Amendment is inherently violative of the United States Constitution.

The questions presented by this appeal are substantial and are of public importance.

Respectfully submitted,

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APPENDIX A.

JUDGMENT ENTRY OF SUPREME COURT OF OHIO.

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

APPENDIX B.

OPINION OF THE COURT OF COMMON PLEAS OF CUYAHOGA COUNTY, OHIO.

FRIEDMAN, J. Gentlemen, it was suggested yesterday that briefs be filed and I stated that it was not necessary, in light of the fact that I have given this matter considerable attention as to the law, and the only question before me was to determine the facts so the proper law can be applied.

There is no question about the facts in this case, so I don't think it is necessary for me to repeat at length save and except to state that the police officer of many years of service and experience had observed the action of the defendants which indicated to him that they were casing a robbery.

There is no doubt in my mind that the officer, based upon his training, length of service, and experience as a police officer and detective, assigned in the area which he had been placed, and doing the job he had been doing, had reasonable cause to believe and to suspect that the defendants were conducting themselves suspiciously and some interrogation should be made of their action.

The Supreme Court of the United States has in many cases of recent years expressed itself clearly and distinctly that a general search and seizure is in violation of the Fourth Amendment unless the search is done with a proper warrant from the court, or if the search is made in connection with a lawful arrest and is contemporaneous and incidental to such arrest. *Henry v. U. S.*, 361 U. S. 98, 4 L. Ed. (2d), 134. *Ker v. California*, 374 U. S., 23, 10 L. Ed. (2d), 726; *Mapp v. Ohio*, 367 U. S. 643, 6 L. Ed. (2d) 1081.

There is no evidence that any warrant had been issued for a search or frisk and I am not going to stretch the facts and say that there was a lawful arrest prior to the frisk of the defendants. I believe it would be stretching the facts beyond reasonable comprehension and foolhardy to say there was a lawful arrest, because there wasn't, from the facts as presented.

It has been frequently stated by the U. S. Supreme Court that a state may establish its own rules and standards pertaining to search and seizure so long as these rules and standards do not violate the substance and spirit of the Fourth Amendmant. It would certainly follow that the same rule would apply to the problem of "stopping and frisking" of an individual by a police officer where the facts justify.

In the case of *Ker v. California*, 374 U. S., 323, 10 L. Ed. (2d) 726, the court pronounced: "A state is not precluded from developing workable rules governing searches to meet the practical demands of effective criminal investigation and law enforcement that does not violate the constitutional standards of what is reasonable search and seizure."

Our courts in Ohio have on many occasions expressed that a police officer has the right to stop a suspicious person for the purpose of interrogation. Therefore, can it be

said that the frisking of said person by the officer for the purpose of his own safety is a standard set by our state that is violative of the Fourth Amendment, or is it a proper guidance to meet the practical demands of effective criminal investigation and the safety of the officer performing his sworn duty? This Court believes that it is the latter view that would be prevailing and that such conduct would not be held as a violation of the Fourth Amendment.

We cannot forego and forget that police officers have a job to do, and they must do the job in connection with crime which has been on the increase.

At the same time a police officer cannot—as far as this Court is concerned—and will not be permitted to stop and frisk an individual simply because he has a suspicion, a mere suspicion, unless they are reasonable circumstances justifying a frisk.

This Court believes there is a distinction between stopping and frisking, and search and seizure.

A search is primarily for the purpose of trying to obtain evidence in connection with the commission of a crime, that the police officer may reasonably believe that a crime has been committed or might be committed.

A frisking is strictly for the protection of the officer's person and his life.

There was reasonable cause in this case for the officer, Detective McFadden, to approach these individuals and pat them. He approached them, and for his own protection frisked them. He did not go into their pockets. Had he gone into their pockets and obtained evidence, as an example, narcotics or illegal slips, there would be no question of an illegal search and seizure.

He merely tapped them about the outer part of their bodies to determine if they had any weapons or guns, for his own personal protection, and by doing so he discovered

that two of the three individuals had concealed guns, and the guns are the fruit of the frisk, and not of a search.

In the case of *People v. Rivera* (7/10/64) decided by New York Court of Appeals, 33 U. S. Law Week, 2044 July 28, 1964, the court stated that a policeman has the authority to stop and question a suspect. "Prompt inquiry into suspicious or unusual conduct is an indispensable power in the orderly government of a large urban communities." (Sic)

The frisk is essential to the stop for without the latter the answer to the police officer may be a bullet, and a loaded pistol discovered during the frisk is admissible.

In the case of *People v. Martin,* 46 Cal. (2d) 106, the court similarly upheld stop and frisk by an officer, and the court in effect stated the security of public order and lives of the police are to be weighed against a minor inconvenience and petty indignity.

I may say at this time, I am a great believer of the personal rights propounded by our Supreme Court, reiterated and reaffirmed, neglected over the years, and given to us under the Fourth Amendment, and other amendments of the U. S. and State Constitutions.

But police officers in a community also have rights under the constitution, and rights given to them by virtue of their office, and one of their rights as I have indicated is the right when the circumstances justify and there is a reasonable suspicion, and for his own personal protection, to stop the individual or individuals and not search, but to frisk, to determine if there are weapons for his own personal safety; and finding the weapon by frisking is the fruit of the stop and frisk, in the same relation that the courts refer to the fruits of the crime on a search and seizure. *Ballard v. State,* 43 Ohio St., 340; *Clark v. DeWalt,* 65 Ohio Law Abs., 193, 203.

I believe that I reiterate again that search and seizure law cannot be applied in this particular case, although Mr. Reuben Payne endeavored to show there was a lawful arrest, but the Court cannot agree. If there was an arrest it came subsequent to the frisk.

But as I have stated, and I repeat again, there is a distinction between a frisk and a search and seizure.

This matter is of great importance and of great concern, and I certainly hope that counsel will endeavor to have this question determined by the Appellate Courts, for it is most desirable that we have clearness with respect to this problem and that the police officers know what they may do and can do in a stop and frisk matter.

The motion in each case is overruled, and exception to the defendants. It is so ordered.

APPENDIX C.

OPINION OF THE COURT OF APPEALS OF OHIO, CUYAHOGA COUNTY, EIGHTH DISTRICT.

SILBERT, *C.J.*

This is an appeal on questions of law from a judgment and sentence imposed by the Court of Common Pleas of Cuyahoga County.

John W. Terry, the appellant herein, was indicted on a charge of carrying a concealed weapon in violation of Section 2923.01, Revised Code. A pre-trial motion to suppress the evidence was denied and upon a plea of not guilty, the Court, sitting without a jury, returned a verdict of guilty.

The relevant facts are as follows: At approximately 2:30 in the afternoon of October 31, 1963, a Cleveland detective with thirty-nine years of experience observed two persons, later identified as John W. Terry and Richard D. Chilton, engaged in behavior, on the corner of East 14th Street and Euclid Avenue (in downtown Cleveland), which immediately attracted his attention and aroused his suspicions. Positioning himself across the street he observed these men for approximately ten to twelve minutes as they alternately left the corner on which the other was stationed, walked several hundred feet up the Huron Road block, peered into the window of either a jewelry store or an airline office and then returned to the corner to converse with the other. In turn the other person would leave the corner, repeat these actions and return to the corner. This procedure was repeated at least two to five times by both men. During this period, a third man, later identified as Carl Katz, approached the corner, spoke briefly to the two men and then departed.

After ten to twelve minutes of this behavior, Terry and Chilton left the corner and proceeded west on Euclid Avenue several hundred feet to where they again met Katz. The three then engaged in a conversation. As the detective testified: "* * * I didn't like their actions on Huron Road, and I suspected them of casing a job, a stick-up * * *." With this belief in mind, the detective approached the three men, identified himself and asked for their names. Receiving only a mumbled response, the detective turned the defendant around, quickly "patted down" the outside of his clothing, and, perceiving a hard object in the inner breast pocket of his topcoat, inserted his hand and removed a fully loaded automatic. At this point the detective ordered the three men into a store, told them to face the wall and yelled to a store clerk to

"call the wagon." He then proceeded to "pat down" Chilton and upon perceiving a hard object in the lefthand pocket of his topcoat, inserted his hand and removed a fully loaded revolver. A similar "patting down" of Katz revealed nothing. The three men were then taken to the police station where Terry and Chilton were charged with carrying concealed weapons. Separate trials were ordered and after a motion to suppress was denied, the defendant Terry was convicted of a felony under Section 2923.01, Revised Code.

In the defendant appellant's brief, the following assignments of error are made:

> 1. The Court erred in not sustaining defendant's Motion to Suppress upon making its finding that the arrest herein was illegal.
>
> 2. The Court erred in refusing to apply constitutional guarantees prohibiting illegal searches and seizures and substituting therefor a doctrine of stop and frisk. The fourth amendment to the United States Constitution provides:
>
> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

This amendment prohibits an arrest without "probable cause," *Wong Sun vs. United States,* 371 U. S. 471 (1962), and is applied against the states through the fourteenth amendment. *Wolf vs. Colorado,* 338 U. S. 25 (1949).

However, the ambiguous nature of the word "arrest" and the issue of the right of the police to stop a person in a public street and question him under circumstances that

would reasonably call for investigation and inquiry present complex legal questions in the factual context of this case. Consequently, the initial question to be resolved is the authority of the detective in the circumstances shown here to stop and question the defendant. The validity of the subsequent police action and the determination of whether the detective had adequate "reasonable grounds" to make the arrest will hinge, in part, on the propriety of this initial inquiry.

The right of the proper authorities to stop and question persons in suspicious circumstances has its roots in early English practice where it was approved by the courts and the common law commentators. See, 2 *Hawkins, Pleas of the Crown,* 122, 129 (6th Ed. 1787): 2 *Hale, Pleas of the Crown,* 89, 96-97 (Amer. Ed. 1847): *Lawrence vs. Hedger,* 3 Taunt. 14, 128 Eng. Rep. 6 (C. P. 1810). Today, in several states, the authority of police officers to detain suspects for a reasonable time for questioning is granted by statute. E.g., N. Y. Code of Crim. Pro., Sec. 180A (1965 Supp.): Gen. Laws of R. I., Sec. 12-7-1 (1956): N. H. Rev. Stat. Ann., Ch. 594, Sec. 2 (1955): 11 Del. Ann. Code, Sec. 1902 (1953): Warner, The Uniform Arrest Act, 28 Va. L. Rev. 315 (1942): Mass. Gen. Laws, Ch. 41, Sec. 98 (1961). In others, the right is recognized by court decisions. E.g., *People vs. Rivera,* 14 N. Y. (2d) 441 (1964): *Gisske vs. Sanders,* 9 Cal. App. 13 (1908): *People vs. Fagenkrantz,* 21 Ill. (2d) 75 (1961).

The United States Supreme Court, however, has never squarely decided whether the police may constitutionally stop and question a suspect without his consent in the absence of adequate grounds for arrest. However, the lower federal courts permit such field interrogations. See, *Henry vs. United States,* 361 U. S. 98, 106 (1959) (Clark, J. dissenting): *Brinegar vs. U. S.,* 338 U. S. 160, 178

(1949) (Burton, J. concurring): *Keiningham vs. United States,* 307 F. (2d) 632 (D. C. Cir. 1962), cert. den. 371 U. S. 948 (1963): *Busby vs. United States,* 296 F. (2d) 328 (9th Cir. 1961), cert. den. 369 U. S. 876 (1962). The cases also indicate that an officer may stop and question even though he has insufficient grounds to make an arrest. See, *Ellis vs. United States,* 264 F. (2d) 372 (D. C. Cir.), cert. den. 359 U. S. 998 (1959): *United States vs. Bonanno,* 180 F. Supp. 71, 78 (S. D. N. Y. 1960), rev'd on other grounds sub nom., *U. S. vs. Buffalino,* 285 F. (2d) 408 (2d Cir. 1960), cited with approval in *U. S. vs. Vita,* 294 F. (2d) 524, 530 (2d Cir. 1961).

Admittedly there is some division of authority on the legality of the right to stop and question; however, the better view seems to be that the stopping and questioning of suspicious persons is not prohibited by the Constitution. See, Note, 50 *Cornell L. Q.* 529, 533 (1965); *United States vs. Vita,* 294 F. (2d) 254 (2d Cir. 1961), cert. den. 369 U. S. 823 (1962). Of great persuasive authority do we consider the long line of California cases, decided under the rule of *People vs. Cahan,* 44 Cal. (2d) 434 (1955) in which this practice has been upheld. E.g., *People vs. Martin,* 46 Cal. (2d) 106 (1956); *People vs. Simon,* 45 Cal. (2d) 645 (1955); *People vs. Jones,* 176 Cal. App. (2d) 265 (1959). Also of great persuasive authority is the recent New York Court of Appeals decision in *People vs. Rivera,* 14 N. Y. (2d) 441 (1964) wherein this practice was also upheld. The courts of Ohio do not appear to have been squarely presented with this problem before. Therefore, we hold, in line with the great weight of authority, that a policeman may, under appropriate circumstances such as exist in this case, reasonably inquire of a person concerning his suspicious on-the-street behavior in the absence of reasonable grounds to arrest.

An individual who acts in a suspicious manner invites a preliminary inquiry by the proper authority. It does not unreasonably invade the individual's right to privacy to hold that the price of indulgence in suspicious behavior is a police inquiry. See, Traynor, Mapp vs. Ohio At Large In The Fifty States, 1962 *Duke L. J.* 319 (1962). Such a minor interference with personal liberty would "touch the right of privacy only to serve it well." *Traynor, supra,* at p. 334. If such questioning failed to reveal probable cause, it would thereby forestall invalid arrests of innocent persons on inadequate cause and the attendant invasion of personal liberty and reputation. If it revealed probable cause, it would do no more than open the way to a valid arrest. The business of the police is not only to solve crimes after they occur, but to prevent them from taking place whenever it is legally possible. As stated by the New York Court of Appeals in the recent case of *People vs. Rivera, supra,* at p. 444:

> "The authority of the police to stop defendant and question him in the circumstances is perfectly clear. * * * Prompt inquiry into suspicious or unusual street action is an indispensable police power in the orderly government of large urban communities. It is a prime function of city police to be alert to things going wrong in the streets; if they were denied the right to such summary inquiry, a normal power and a necessary duty would be closed off."

Admittedly, this power to inquire may be abused. But the possibility of some future infraction should not require that the police should now be made powerless to make reasonable inquiries into suspicious behavior. If such abuses arise, we shall deal with them when the time comes. However, for the present, we hold that under the facts of this case, the detective's inquiry was reasonable under the conditions presented.

The appellant contends, however, that in the instant case, despite a right of inquiry, the arrest took place the moment the defendant was questioned by the detective. According to his argument, since the arrest took place at the time of the initial inquiry, there was at that time no adequate "reasonable grounds" to arrest and therefore under the exclusionary rule of *Mapp vs. Ohio,* 367 U. S. 643 (1961), the evidence must be suppressed. In support of this the defendant appellant's brief states: "Since the police officers in this case did not conduct any interrogation of the defendant and his companions other than an inquiry of their names * * * his purpose was to arrest and not to interrogate."

A principal cause of the difficulty here is the ambiguous nature of the word "arrest." Some courts have used the term "arrest" to signify the mere act of stopping or restraining a person. But the term "arrest" is more commonly used in the technical criminal law sense as the seizure of an alleged offender to answer for a crime. Note, 39 *N. Y. U. L. Rev.* 1093, 1096 (1964); *Commonwealth vs. Lehan,* 347 Mass. 197 (1964). The cases decided by the United States Supreme Court appear to have adopted this later usage, see *Carroll vs. United States,* 267 U. S. 132, 136 (1925); *Brinegar vs. United States,* 338 U. S. 160, 163 (1949), and it is the usage that has been adopted by the courts of Ohio. In 5 *Ohio Jurisprudence* (2d), Arrest, Sec. 3, p. 19, "arrest" is defined as follows:

> "An arrest as the term is used in criminal law signifies the apprehension or detention of the person of another in order that he may be forthcoming to answer an alleged or supposed crime."

Similarly, in *State vs. Milam,* 108 Ohio App. 254, 268 (1959), this court quoted with approval the following definition of arrest:

"To constitute an 'arrest,' four requisites are involved: A purpose to take the person into custody of the law, under real or pretended authority and an actual or constructive seizure or detention of his person, so understood by the person arrested."

It is readily apparent that a required element of an arrest is the *intent* of the officer to arrest. *United States vs. Bonanno, supra,* at 81-83. In the instant case, when the detective approached the defendant, he had, as shown by uncontradicted testimony, no intention at all to arrest, but only to inquire as to the defendant's activities. As stated in the record:

"Q. You observed these men for some ten to twelve minutes?

A. That's right.

Q. You observed the mode of conduct that you have described to us?

A. That's right.

Q. Did you, sir, as a police officer consider that you should investigate it?

A. I did.

* * *

Q. * * * after they left the corner and you observed them again in front of * * * (the store where the three men met) * * * what did you do?

A. I stopped them and went over and talked to them."

As to the exact time when the arrest took place, the record shows:

"Q. Then in this situation you considered them to be under arrest when you ordered the store people to call for the wagon?

A. That's right."

The defendant appellant, however, contends that the case of *Henry vs. United States,* 361 U. S. 98 (1959), estab-

lishes the point that the arrest in the instant case took place the moment the defendant was stopped by the detective. However, in the *Henry* case, the government conceded in the lower courts, see 259 F. (2d) 725 (7th Cir. 1958), and adhered to the concession before the Supreme Court, that the "arrest" occurred the moment the car in which Henry was riding was stopped by the federal agents. The Supreme Court in its opinion stated:

> "The prosecution conceded below, and adheres to that concession here, that the arrest took place when the federal agents stopped the car. This is our view of the facts of this particular case." 361 U. S. at 103.

When the opinion in *Henry* is read in light of this concession, it is apparent that the court was only deciding that, in the circumstances of that case, there was no probable cause to justify an "arrest" at the time the car in which Henry was riding was stopped. See, *United States vs. Bonanno, supra* at p. 85; *Busby vs. United States, supra.* Therefore, we hold that, in the instant case, the actual arrest did not occur until the defendant was ordered into the store after the loaded gun was discovered concealed on his person; Cf. *Rios vs. United States,* 364 U. S. 253 (1960).

Having determined that the police officer could validly inquire into the activities of the defendant, then it follows that the officer ought to be allowed to frisk, under some circumstances at least, to insure that the suspect does not possess a dangerous weapon which would put the safety of the officer in peril. See, Remington, The Law Relating to "On The Street" Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General, 51 *J. Crim. L., C. & P. S.* 386, 391 (1960). What is the officer to do in this situation? Are we to allow him the right of inquiry and then, when this right is exercised, reward him with an assailant's bullet? The practice of

frisking is well accepted in police practice and police officers seem unanimous in stating that frisking is done for self-protection and not as a mere evidentiary fishing expedition. See, Note, Philadelphia Police Practice and The Law of Arrest, 100 *U. Pa. L. Rev.* 1182 (1952); Leagre, The Fourth Amendment and The Law of Arrest, 54 *J. Crim. L., C. & P. S.* 393 (1963). The Uniform Arrest Act and the state statutes which provide for questioning of suspicious persons specifically allow for the frisking of a suspect. See, Warner, The Uniform Arrest Act, 28 *Va. L. Rev.* 315 (1942); Gen. Laws of R. I., Sec. 12-7-2 (1956); N. H. Rev. Stat. Ann., Ch. 594, Sec. 3 (1955); 11 Del. Code Ann., Sec. 1903 (1953); N. Y. Code Crim. Pro., Sec. 180a (1965 Supp.). In other states the right is recognized by court decision. See, *People vs. Rivera,* 14 N. Y. (2d) 441 (1964); *People vs. Martin,* 46 Cal. (2d) 106 (1956); *People vs. Simon,* 45 Cal. (2d) 645 (1955); *People vs. Jones,* 176 Cal. App. (2d) 265 (1959).

In the instant case this officer, of thirty-nine years experience, reasonably suspected that the defendant was "casing" a store with robbery in mind. It was also logical for this experienced detective to presume that the defendant was armed and dangerous. As stated in the record:

> "Q. Detective McFadden, can you tell us why you turned John Terry around facing the other two men, with you behind him?
>
> "A. Due to my observation, the observation on Huron Road of these two men, I felt as though they were going to pull a stick-up and they may have a gun."

However, we must be careful to distinguish that the frisk authorized herein includes only a frisk for a dangerous weapon. It by no means authorizes a search for contraband, evidentiary material, or anything else in the

absence of reasonable grounds to arrest. Such a search is controlled by the requirements of the fourth amendment and probable cause is essential. *White vs. United States,* 271 F. (2d) 829 (D. C. Cir. 1959). Therefore, we hold only that on the facts presented in the instant case, the frisk for dangerous weapons was valid as an incident to a valid inquiry by the police. Each case must be decided upon its own facts.

As a result of the valid frisk, a fully loaded automatic was discovered concealed on the person of the defendant. The unauthorized possession of this weapon is a felony under Section 2923.01, Revised Code. According to the uncontradicted evidence in this case, the defendant was not arrested until after he was ordered into the store. At the moment of the arrest, the detective had reasonable grounds to believe a felony was being committed. As stated in *Beck vs. Ohio,* 379 U. S. 89 (1964):

> "Whether an arrest is constitutionally valid depends upon whether, at the moment the arrest is made, the officers had probable cause to make it—whether at that moment, the facts and circumstances within their knowledge of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing the petitioners had committed or were committing an offense."

Therefore, we hold that, as the detective had validly found the gun, he had at the moment of the arrest adequate probable cause to arrest the defendant, *Busby vs. United States, supra,* and that the arrest in no way violated the fourth amendment.

One further point remains to be discussed concerning defendant appellant's contention that the arrest occurred at the time of the initial questioning and therefore under the exclusionary rule of *Mapp vs. Ohio,* 367 U. S. 643

(1961), the evidence must be suppressed. Although we had held that the arrest in this case did not take place until the defendant was ordered into the store, we must note in passing that even if the arrest took place as appellant contends, it does not necessarily follow that this evidence must be suppressed.

The *Mapp* exclusionary rule was imposed upon the states not because of some command inherent in the fourth amendment, but rather because the Supreme Court believed that it was the only way the police could be forced to respect the fourth amendment. If the police could not obtain a conviction using evidence unlawfully obtained, they would have no incentive to conduct illegal searches. If we keep in mind this raison d'etré of the exclusionary rule, we can guard against confusion in the attendant rules that are developed. A judicial rule rendering evidence produced as the result of a frisk inadmissible would fail to deter the police from frisking suspects believed to be armed as police frisk for their own protection rather than for the purpose of looking for evidence. A rule of inadmissibility in such cases could only result in allowing the armed criminal to go free although failing to any meaningful extent to protect individual liberty. The exclusionary rule of illegally obtained evidence cannot be interpreted solely to provide a tidy "fox hunting" theory of criminal justice. The purpose of the exclusionary rule is to control police misconduct and in this context it must be applied. Traynor, Mapp vs. Ohio At Large In the Fifty States, 1962 *Duke L. J.* 319 (1962); Note, 50 *Cornell L. Q.* 529 (1965).

Furthermore, even if the Supreme Court would hold that federal officers may not inquire into suspicious street activities or frisk in the absence of probable cause to arrest, this does not necessarily invalidate the applicable

state rules. There is no mandate in the Mapp opinion that the states henceforth must abide by all the interpretations of the federal courts. Traynor, Mapp vs. Ohio At Large In The Fifty States, *supra,* at 320. Local problems of law enforcement are quite different from federal problems, and the range of crimes encompassed by the states' jurisdiction creates more complicated patterns to be dealt with. The states are not precluded from developing "workable rules" governing arrest, searches and seizures to meet the practical demands of effective criminal investigation and law enforcement provided these rules do not violate the constitutional proscriptions against unreasonable searches and the concomitant command that evidence so seized is inadmissible against one who has standing to complain. *Ker vs. California,* 374 U. S. 23 (1963); *Beck vs. Ohio,* 379 U. S. 89 (1964). The necessities of law enforcement in large urban areas require the procedures utilized in the instant case. We agree with the District of Columbia Court of Appeals when they stated that they cannot believe that the "Supreme Court has forbidden the police to investigate crime." *Trilling vs. United States,* 260 F. (2d) 677, 700 (D. C. Cir. 1958).

For the reasons stated herein, the judgment of the Common Pleas Court is affirmed.

Exceptions. Order see journal

ARTL, J. and CORRIGAN, J. concur.

APPENDIX D.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI.

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 18, 1967/

s/ POTTER STEWART,

Associate Justice of the Supreme Court of the United States.

Dated this 12th day of January, 1967.

APPENDIX E.

STATUTE.

§ 2923.01 Carrying of Concealed Weapons.

No person shall carry a pistol, bowie knife, dirk, or other dangerous weapon concealed on or about his person. This section does not affect the right of sheriffs, regularly appointed police officers of municipal corporations, regularly elected constables, and special officers as provided by sections 311.07, 737.10, 1717.06, 1721.14, and 2917.32 of the Revised Code, to go armed when on duty. Deputy sheriffs and specially appointed police officers, except as are appointed or called into service under said sections may go armed of they first give bond to this state, to be approved by the clerk of the court of common pleas, in the sum of one thousand dollars, conditioned to save the public harmless by reason of any unlawful use of such weapons carried by them. Persons injured by such improper use may have recourse on said bond.

Whoever violates this section shall be fined not more than five hundred dollars, or imprisoned in the county jail or workhouse not less than thirty days nor more than six months, or imprisoned in the penitentiary not less than one nor more than three years.

SUPREME COURT, U.S.
FILED
APR 6 1967
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1161.~~ 67

JOHN W. TERRY and
RICHARD D. CHILTON,
Petitioners,

v.

STATE OF OHIO,
Respondent.

BRIEF OF AMICUS CURIAE, AMERICAN CIVIL LIBERTIES UNION OF OHIO In Support of Petition for Writ of Certiorari.

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U. S. News & World Report, February 27, 1967, p. 74 3

In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1161.

JOHN W. TERRY and
RICHARD D. CHILTON,
Petitioners,

v.

STATE OF OHIO,
Respondent.

BRIEF OF AMICUS CURIAE, AMERICAN CIVIL LIBERTIES UNION OF OHIO In Support of Petition for Writ of Certiorari.

INTEREST OF AMICUS.

The American Civil Liberties Union of Ohio is the Ohio affiliate of the American Civil Liberties Union, a national organization of persons dedicated to the preservation of a free and open society, principally through the protections embodied in our Bill of Rights and the Fourteenth Amendment to the United States Constitution.

The formulation of standards of criminal due process consistent with the imperatives of individual liberty in an ordered society has long been a vital function of this Court. The entire spectrum of the rights of the accused has demanded, and quite properly received, its ever-increasing attention. Nowhere, however, is the relationship between the accused and prosecutorial government more critical than at the very inception of the criminal process—at the

point of arrest and accompanying search—an area traditionally safeguarded by the protections of the Fourth Amendment.

This case involves the application of important Fourth Amendment considerations to on-the-street detention and interrogation, (an area of law known in street vernacular as "stop and frisk,") which has been thrust upon the constitutional stage by this Court's decisions in *Mapp v. Ohio*, 367 U. S. 643 (1961) which held that the yield of illegal searches and seizures is inadmissible in evidence against the accused in state criminal proceedings, and *Beck v. Ohio*, 379 U. S. 89 (1964), which held that state arrests in the absence of probable cause do not justify warrantless accompanying searches. These cases demonstrate this Court's great and continuing concern for the inviolability of the right of privacy of the accused, except upon a clear showing by law enforcement authorities of probable cause to invade it.

But for the serious assault upon precious Fourth Amendment principle which, in the name of police necessity, has been mounted by those who seek to circumvent the federal standards of exclusion of tainted evidence required by *Mapp* and *Beck*, no special attention to "stop and frisk" police activity would be indicated. But, unless this Court acts, recent "stop and frisk" case law,[1] legisla-

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[1] *California*: People v. Garrett, 238 Cal. App. 2d 292, 47 Cal. Rptr. 731 (3d Dist. Ct. App. 1965); *Massachusetts*: Commonwealth v. Ballou, 217 N. E. 2d 187 (1966); *New York*: People v. Sibron, 18 N. Y. 2d 603, 219 N. E. 2d 196, 35 U. S. L. Week 3321 (U. S. March 14, 1967) (No. 821 Misc.; renumbered 1039, March 21, 1967); People v. Peters, 18 N. Y. 2d 238, 219 N. E. 2d 595 (1966); People v. Pugach, 15 N. Y. 2d 65, 204 N. E. 2d 176, cert. denied 380 U. S. 936 (1965); People v. Rivera, 14 N. Y. 2d 441, 201 N. E. 2d 32, cert. denied 379 U. S. 978 (1964); *Pennsylvania*: Commonwealth v. Hicks, 223 A. 2d 873 (Pa. Super. Ct. 1966). But see United States v. Margeson, 259 F. Supp. 256 (E. D. Pa. 1966).

tion[2] and public debate[3] will have effectively emasculated the shield of probable cause which the Fourth Amendment has interposed between the legitimate investigative function of the police and the right of the individual citizen, as against his government, to be let alone.

On-the-street detention and interrogation is a particularly sensitive area. It is the point at which the police officer has his greatest contact with the community in whose service he is employed. The failure, in the name of police efficiency, to compel constitutional conduct in this sphere is, in the long view, inefficient as well as un-

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[2] N. Y. Code Crim. Proc. § 180-a. A "Stop and Search" bill was introduced in the Ohio legislature early in the 1967 session and defeated after a vigorous floor debate. See Cleveland Plain Dealer, Feb. 23, 1967, p. 4 col. 3. A similar fate was met by a recently proposed Illinois statute. See, *Frisking in the Absence of Sufficient Grounds for Arrest as a Common Police Practice Today*, 1965 U. ILL. L. F. 119, 127, see also, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 2.02 (Tent. Draft No. 1, 1966); A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (U. S. Govt. Printing Agency, Feb. 1967).

[3] Souris, *Stop and Frisk or Arrest and Search—The Use and Misuse of Euphemisms*, 57 J. CRIM. L. C. & P. S. 251 (1966); Schoenfeld, *The "Stop and Frisk" Law is Unconstitutional*, 17 SYRACUSE L. REV. 627 (1966); Comments, *Police Power to Stop, Frisk and Question Suspicious Persons*, 65 COLUM. L. REV. 848 (1965); Redlich, *Constitutional Law*, 16 SYRACUSE L. REV. 211 (1965); Notes, 50 CORNELL L. Q. 529 (1965); *Frisking in the Absence of Sufficient Grounds for Arrest as a Common Police Practice Today*, 1965 U. ILL. L. F. 119; Ronayne, *The Right to Investigate and New York's "Stop and Frisk" Law*, 33 FORDHAM L. REV. 211 (1964); Decisions, 10 N. Y. L. F. 410 (1964); Comments, 39 N. Y. U. L. REV. 1092 (1964); *New York "Frisk" and "Knock-Not" Statutes: Are They Constitutional?* 30 BROOKLYN L. REV. 274 (1964); Recent Decisions, 31 BROOKLYN L. REV. 174 (1964); Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. CRIM. L., C. & P. S. 373 (1963); see also, U. S. News & World Report, February 27, 1967, p. 74; *Cleveland Plain Dealer*, February 12, 1967, p. 10-AA col. 1; Bruno, *Chicago's Scholarly Cop*, Reporter, March 24, 1966; *New York Times*, March 9, 1964, p. 24, col. 1; and *Civil Liberties and Police Power*, The Commonweal, April 3, 1964, p. 29.

constitutional—it serves only to discredit the entire system of law enforcement in the eyes of the community which it serves and upon which it must ultimately depend to combat crime.

In urging strong adherence to constitutional protections against police misconduct in the "stop and frisk" area, *amicus* intends no criticism of police officers generally, nor of the police officer whose conduct it here seeks to restrain. That he was only trying to do his job and that policemen generally are trying to do theirs is not denied. Unfortunately, the refusal of other governmental agencies to clearly delineate constitutional police conduct has left this Court with the obligation to tell the police what their job is, and what means they may constitutionally use to do it.

The record in the present case provides a clear opportunity for this Court to confront the constitutional implications of the "stop and frisk" problem under circumstances uncomplicated either by factual discrepancy in the record or by legislative enactment on the subject.

It is in the hope that in some measure *amicus* may be of assistance to the Court in performing its delicate task of weighing "the social need that crime shall be repressed" [4] against "the social need that the law will not be flouted by the insolence of office" [5] that this brief is filed.

Because we consider it to be highly important to the advancement of these objectives that this Court consider the case at bar on its merits, *amicus* has elected to participate at this preliminary stage of these proceedings by filing this brief in support of the petition for certiorari.

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[4] Cardozo, J. in *People v. Defore*, 242 N. Y. 13, 24, 150 N. E. 585, 589 (1926).

[5] *Ibid.*

The written consent of the parties to this appearance *amicus* has been obtained and filed with the Clerk of the Court.

QUESTIONS PRESENTED.

I.

Was the warrantless detention and interrogation of petitioners in broad daylight on a busy street by a police officer who, solely on the basis of his observation of the ambiguous conduct of the petitioners, suspected that they were about to rob a store, an illegal arrest in violation of the Fourth and Fourteenth Amendments to the United States Constitution?

II.

In the absence of a contemporaneous valid arrest, was the warrantless "frisk" of the person of petitioner Terry for weapons an illegal search requiring suppression of its yield under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution?

III.

Where a police officer had neither probable cause to arrest, nor probable cause to search petitioners, but detained petitioners on a busy street in broad daylight for the purpose of interrogating them in connection with their involvement in a crime which he suspected they were about to commit, was the "frisk" of the person of petitioner Terry solely to protect the police officer's life independently justifiable on that ground, so that weapons seized as a result of such "frisk" could be admitted in evidence against the accused without violating the exclusionary rule of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE.

On October 31, 1963, at about 2:30 p.m., in broad daylight, petitioners were seen on a busy street in the business district in downtown Cleveland, Ohio.[6] A plain-clothes police officer,[7] assigned to stores and pickpockets in the downtown area,[8] observed their behavior for a period of about ten minutes,[9] from a vantage point across the street approximately 300 to 400 feet away.[10] He noted that petitioners, both Negroes, were walking back and forth on the sidewalk in front of a row of stores, peering in the windows of one of several stores,[11] and returning to the corner, when they engaged in conversation with each other, and ultimately with a third man, a white man, who joined them later.[12] Although he had no previous information about them,[13] and did not know them,[14] and admitted that there was nothing unusual about their dress or appearance,[15] or their gait,[16] he "suspected they were waiting for an opportunity to pull a stick-up,"[17] despite the fact that he had never arrested anyone before for a prospective "stick-up,"[18] nor had he ever in his entire

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[6] R. 12, 116.

[7] R. 122.

[8] R. 106.

[9] R. 13.

[10] R. 12.

[11] R. 23, 119.

[12] R. 13, 22.

[13] R. 119.

[14] R. 119.

[15] R. 120.

[16] R. 15, 121.

[17] R. 138.

[18] R. 160.

thirty-five years of experience as a detective observed anyone "casing a place" for prospective misconduct.[19]

He subsequently testified that he "didn't like them,"[20] or "their actions,"[21] that he "was just attracted to them and * * * surmised that there was something going on,"[22] and that he did not know whether, if he saw them engaged in the identical conduct again he would have had any cause for suspicion.[23]

In any event, when the police officer saw the three men conversing, he ran across the street,[24] and, in the ordinary pedestrian traffic of a busy street in a commercial district during business hours,[25] accosted petitioners and the other man.[26] He said he was a police officer but did not show his badge,[27] or identify himself further.[28] He asked the men their names,[29] and they responded with alacrity.[30] Whereupon the police officer grasped petitioner Terry, turned him around and patted the outside of his topcoat, felt the outlines of a weapon, reached into the upper left hand inside pocket of his topcoat, felt the handle of a gun, and, when he could not pull the gun out of the pocket easily, pulled the topcoat off petitioner and seized the weapon.[31] The police officer then ordered the

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[19] R. 46.
[20] R. 118.
[21] R. 42.
[22] R. 118.
[23] R. 47.
[24] R. 121.
[25] R. 124.
[26] R. 16.
[27] R. 122.
[28] R. 123.
[29] R. 16, 123.
[30] R. 16.
[31] R. 16, 124.

three men into a nearby store,[32] shouted to the storekeeper to "call the wagon," [33] at which point the police officer concedes all three men were under arrest, Terry for carrying a concealed weapon,[34] the other two for "association with him."[35] While they had their hands raised above their heads, the police officer proceeded to search petitioner Chilton and the other man,[36] and discovered and seized a gun in the outer left hand pocket of Chilton's coat.[37] Search of the other man revealed no weapons.[38] All three men were transported to the police station.[39] Petitioners were charged initially with "investigation" and then with carrying concealed weapons in violation of Section 2923.01 Ohio Revised Code.[40]

In response to separate indictments returned against each of the petitioners,[41] both moved to suppress the seized weapons in advance of trial.[42] Because the legal questions raised in both motions to suppress were interrelated, they were consolidated by the court,[42a] and an oral hearing, during which the police officer appeared as the sole witness,[43] was held. The trial judge, after expressly rejecting the contention of the prosecution that the seizure of the weapons was pursuant to a lawful ar-

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[32] R. 13, 125.
[33] R. 125.
[34] R. 33.
[35] R. 131.
[36] R. 17.
[37] R. 17, 19.
[38] R. 17.
[39] R. 134.
[40] R. 129.
[41] R. 4.
[42] R. 4.
[42a] R. 5.
[43] R. 11-48.

rest,[44] overruled the defense motions to suppress the weapons as evidence, on the ground that "the guns [were] the fruit of the frisk, and not of a search."[45]

At the subsequent trials of each of the petitioners, the defense unsuccessfully renewed its motion to suppress the weapons as evidence,[46] the weapons were admitted into evidence and each of the petitioners was convicted as charged.[47] *State v. Chilton*, 95 Ohio L. Abs. 321 (Cuyahoga Common Pleas, 1964). The Court of Appeals of the Eighth Judicial District of Ohio affirmed the convictions. *State v. Terry*, 5 Ohio App. 2d 122, 214 N. E. 2d 114 (1966). The Ohio Supreme Court denied defense motions to certify the questions on October 19, 1966. It is these adverse decisions from which petitioners seek relief in this Court.

REASONS FOR GRANTING THE WRIT.

It cannot be doubted that for many years, state police officers have been stopping and frisking[48] suspects, without their consent, without a search warrant or probable cause, and using the yield of such searches to convict them of crimes. The constitutionality of such police

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[44] R. 100.

[45] R. 98.

[46] R. 103, 222.

[47] R. 233.

[48] The use by *amicus* of the term "stop and frisk" throughout this brief is occasioned by its brevity rather than its street sophistication. Wherever generally used, and as used here, the phrase has come to mean on-the-street detention for purposes of police interrogation, accompanied by a search of the person of the suspect, ostensibly for the purpose of protecting the safety of the police officer. In the absence of probable cause to search, the subsequent use of incriminating evidence so obtained to convict the suspect of a crime, demonstrates that under some circumstances, a policeman's suspicion, like virtue, is its own reward.

practice has been in doubt at least since *Wolf v. Colorado,* 338 U. S. 25 (1949), which applied the core of the Fourth Amendment to the states through the Due Process Clause of the Fourteenth. The evidence so seized has been constitutionally inadmissible in state criminal cases since *Mapp v. Ohio,* 367 U. S. 643 (1961) as a result of the elevation of the federal exclusionary rule of *Weeks v. United States,* 232 U. S. 383 (1914), to a constitutional command. And when *Beck v. Ohio,* 379 U. S. 89 (1964) made it clear that federal standards of arrest, including the constitutional condition precedent of probable cause, set the minimal requirements of valid *state* arrest as well, the constitutional threat to continued state police "stop and frisk" activity was evident.

The response of the proponents of "stop and frisk" police conduct was immediate and imaginative. Unable to seriously claim either that probable cause is not an essential precondition of constitutional arrest, or that probable cause can be demonstrated in the circumstances of the classic on-the-street detention, they urged that the detention of a citizen for a short period for interrogation and investigation purposes was not an arrest at all, despite the restraint upon the liberty of the suspect. By such semantic wizardry the "stop" was transformed into a sub-arrest or non-arrest, to which none of the constitutional requirements of arrest applied. And probable cause as a standard against which to measure the lawfulness of the detention was thereby effectively bypassed.

But the architects of "stop and frisk" justification were faced with a more serious Fourth Amendment problem: the "frisk" which followed the "stop" was on even more shaky constitutional ground. For whether the stop was considered to be an *unlawful* arrest or *no arrest at all,* it is apparent that by no stretch of the imagination could there have been a lawful arrest which might have

justified an incidental search, absent a search warrant or probable cause to search. And since this Court has never sanctioned any non-consensual search as "reasonable" which was neither incidental to a lawful arrest, nor supported by a valid search warrant or probable cause, and appears to be disinclined to do so, the apologists for "stop and frisk" police conduct resolved the "frisk" problem in the same fashion as they had disposed of the "stop" question. Since the "stop" was not an arrest, it was not difficult for them to conclude that the accompanying "frisk" was not a search, and that Fourth Amendment considerations were therefore as inapplicable to the "frisk" as to the "stop." The police officer's running his hands over the body of the suspect in the public street in a search for weapons was excused as but a minor invasion of privacy necessary to protect the officer's safety during the period of interrogation; in the event that the "frisk" yielded incriminating evidence, no exclusionary rule could suppress it, for the public policy which permits police officers to frisk for weapons to protect their own safety also requires that the yield of the frisk be allowed into evidence to convict the accused long after the danger to the police, real or imagined, has been dissipated.

Thus did the lower courts in the instant case reason in order to sustain the conviction of petitioners. Refusing to accept the contention of the prosecution that the detention of petitioners constituted a lawful arrest,[49] they substituted the "reasonableness" of the police officer's

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[49] Although the prosecution urged that there was indeed an arrest—a lawful arrest based upon probable cause—prior to the search for weapons, the trial court, sitting as the trier of fact, rejected such a view of the evidence. "If there was an arrest it came subsequent to the frisk." See Appendix B, p. 44. The Court of Appeals held that the detention did not constitute an arrest "in the technical criminal law sense." See Appendix C, pp. 50, 52.

conduct in protecting his own safety for probable cause,[50] in order to justify the accompanying search for weapons.[51] And although the original reason for the detention and interrogation was to prevent a *possible* robbery *in futuro*, and the accompanying search was justified as reasonable conduct by the police officer "to protect himself from a *possible* assault with a dangerous weapon," the yield of the non-search incidental to the non-arrest resulted in the conviction of petitioners of neither robbery nor armed assault, but of an entirely different felony—carrying a concealed weapon. Of such spiderwebs are the convictions in the case at bar fashioned.

Amicus urges that (I) the detention and interrogation was an arrest within the purview of the Fourth Amendment, as applied to the states through the Fourteenth, and that it was invalid by operation of that same constitutional authority; (II) the "frisk" for weapons was a search within the meaning of the Fourth Amendment, as applied to the states through the Fourteenth, and invalid by that

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[50] It is of more than passing interest to note that this Court has never used the "reasonableness" test to take the place of probable cause as a necessary element of a lawful arrest or search. In United States v. Rabinowitz, 339 U. S. 56 (1950), this Court enunciated the "reasonableness" test solely for the purpose of determining whether, after an arrest pursuant to a valid warrant, a showing of probable cause to search was sufficient to preclude the necessity of obtaining a search warrant as well.

[51] The trial court noted that "a police officer * * * will not be permitted to stop and frisk an individual simply because he has a suspicion" unless accompanied by "*reasonable circumstances* justifying a frisk." Such circumstances include "reasonable suspicion" and "[fear] for his own personal protection." See Appendix B, pp. 42, 43. In the Court of Appeals, the "frisk for dangerous weapons" was held to be "valid as an incident to a valid inquiry by the police." It was held "*not unreasonable* for a policeman * * * to frisk * * * the person in order to protect himself from a possible assault with a dangerous weapon." (Throughout this brief any italicizing of quoted material has been supplied by *amicus* unless otherwise indicated.)

same authority; and (III) the seizure of the yield of the search for use in evidence against the petitioners in a subsequent prosecution cannot be justified by the public policy of protecting the safety of police officers.

Each of these contentions will be considered in sequence below.

I.

THE DETENTION AND INTERROGATION WAS AN ILLEGAL ARREST.

The Fourth Amendment has been interpreted to prohibit a warrantless arrest without "probable cause." [52] The requirement of probable cause is a compromise which has been found for accommodating the citizen's basic right to privacy and the need for effective criminal investigation and law enforcement. "Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." [53] And the rule applied to the states through the Due Process Clause of the Fourteenth Amendment is the same.[54]

Mere suspicion on the part of the arresting officer does not rise to the dignity of probable cause. Probable cause exists where the facts and circumstances within the officer's knowledge, and of which he had trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been

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[52] See Wong Sun v. United States, 371 U. S. 471 (1963); Rios v. United States, 364 U. S. 253 (1960); Henry v. United States, 361 U. S. 98 (1959); Draper v. United States, 358 U. S. 307 (1959); Brinegar v. United States, 338 U. S. 160 (1949) and Carroll v. United States, 267 U. S. 132 (1925).

[53] Brinegar v. United States, 338 U. S. 160, 176 (1949).

[54] Wolf v. Colorado, 338 U. S. 25 (1949); Beck v. Ohio, 379 U. S. 89 (1964).

or is being committed.[55] It is clear that, unless it can be shown that the arresting officer, *prior to the arrest of the accused*, had probable cause to believe that the accused was guilty of an offense, the arrest is invalid, and the fruits of the search of his person made incidental thereto must be suppressed.[56] It therefore becomes critical to determine the precise moment when the arrest took place.[57]

It will be recalled that in the case at bar, the arresting officer observed petitioners walking back and forth in front of a row of stores on a busy street in the downtown business district. It was broad daylight in the early afternoon of a business day. Although their conduct was innocuous, or, at very most, ambiguous, and he had no other information about them, the officer suspected that they were about to rob one of the stores. He left his vantage point about 300 feet away, ran across the street, and accosted petitioners, who were talking to a third man on the sidewalk some little distance from the place where they had been originally observed. He identified himself as a police officer, and asked the three men their names. They answered quickly. Whereupon the officer grasped petitioner

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[55] See Beck v. Ohio, 379 U. S. 89 (1964); Henry v. United States, 361 U. S. 98 (1959); Brinegar v. United States, 338 U. S. 160 (1949); Carroll v. United States, 267 U. S. 132 (1925).

[56] Beck v. Ohio, 379 U. S. 89 (1964); Rios v. United States, 364 U. S. 253 (1960); Henry v. United States, 361 U. S. 98 (1959); City of Lakewood v. Smith, 1 Ohio St. 2d 128, 205 N. E. 2d 388; 30 Ohio Op. 2d 482 (1965).

[57] Although this question is of obvious importance, it was rarely litigated prior to the imposition of the exclusionary rule of Mapp v. Ohio, 367 U. S. 643 (1961). Until the Mapp decision, evidence seized incident to an unconstitutional arrest by state officers could be introduced in state courts. Wolf v. Colorado, 338 U. S. 25 (1949). Furthermore, such evidence could be used retroactively to provide probable cause for the arrest. See Ronayne, *The Right to Investigate and New York's "Stop and Frisk" Law*, 33 Fordham L. Rev. 211, footnote 1 (1964).

Terry, spun him around, and patted the outside of his topcoat. He felt the outlines of a gun in the inside pocket of Terry's coat, reached in and felt the handle of the gun, pulled the topcoat off him and seized the weapon. He ordered all three men into a nearby store, concedes that by this time all were under arrest, and searched the other two men. The search of petitioner Chilton yielded another gun, which the officer confiscated.

Upon these undisputed facts, at what point did the arrest take place? At the moment that the arresting officer stopped the petitioners and the third man for the purpose of interrogating them? At the moment he first laid hands on petitioner Terry, prior to the "frisk" for weapons? Or at the moment when he ordered the three men into the nearby store, immediately before searching the other two men? This is a critical constitutional determination for the purpose of testing probable cause because of the varying state of knowledge of the arresting officer at each stage of events.

There is ample authority for the contention that at the moment the three men were first stopped and questioned by a police officer who identified himself as such—at the moment they were restrained of their liberty of motion by a law enforcement authority of the state—they were under arrest for constitutional purposes. *Henry v. United States*, 361 U. S. 98, 103 (1959) so holds. Those who seek to avoid the consequences of the *Henry* "moment of restriction of liberty" rule of arrest (including the Court of Appeals below)[58] urge that the Government concession in *Henry* that the arrest took place at the moment of the "stop" limits that decision to its particular facts. Such attempts to dilute the holding of *Henry* fail to consider the

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[58] See Appendix C, p. 52.

fact that although the Court was not bound by the Government's concession,[59] it viewed the facts of the case independently and concluded that "[w]hen the officers interrupted the two men and *restricted their liberty of movement*, the arrest * * * was complete." [60] There is substantial lower court authority to support this interpretation of *Henry*.[61]

The determination that the arrest of petitioners took place at the moment they were stopped and interrogated by a police officer under a clear statement of his police authority to do so, is supported by the foregoing case law. The failure or refusal of some courts which take a contrary view[62] to recognize the authority of *Henry v.*

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[59] 361 U. S. at 105 (Clark, J., dissenting).

[60] *Id.* at 103. Cf. Rios v. United States, 364 U. S. 253 (1960).

[61] See United States v. Baxter, 361 F. 2d 116 (6th Cir. 1966), cert. denied 87 S. Ct. 79 (1966); Kelly v. United States, 298 F. 2d 310 (D. C. Cir. 1961); Coleman v. United States, 295 F. 2d 555 (D. C. Cir. 1961), *cert. denied* 369 U. S. 813 (1962); Green v. United States, 259 F. 2d 180 (D. C. Cir. 1958), *cert. denied*, 359 U. S. 917 (1959); United States v. Scott, 149 F. Supp. 837 (D. C. D. C. 1957); Long v. Ansell, 69 F. 2d 386 (D. C. Cir. 1934).

Also see Foote, *The Fourth Amendment: Obstacle or Necessity and the Law of Arrest*, 51 J. Crim. L., C. & P. S. 402 (1960).

[62] *Federal Cases:* United States v. Thomas, 250 F. Supp. 771 (S. D. N. Y. 1966); United States v. Vita, 294 F. 2d 524 (2d Cir. 1961), cert. denied 369 U. S. 823 (1962); Busby v. United States, 296 F. 2d 328 (9th Cir. 1961); United States v. Bonanno, 180 F. Supp. 71 (S. D. N. Y. 1960) *rev'd other grounds sub nom.*; United States v. Bufalino, 285 F. 2d 408 (2d Cir. 1960). *State Cases:* People v. Rivera, 14 N. Y. 2d 441, 201 N. E. 2d 32, 252 N. Y. S. 2d 458 (1964), cert. denied 379 U. S. 978 (1965); Goss v. State, 390 P. 2d 220 (Alaska) cert. denied 379 U. S. 859 (1964); State ex rel. Branchaud v. Hedman, 269 Minn. 375, 130 N. W. 2d 628 (1964); State v. Hope, 85 N. J. Super. 551, 205 A. 2d 457 (App. Div. 1964). Several states permit police detention and interrogation without probable cause by statute. See Delaware Code Ann. Title 11, Sections 1902-03 (1953); New Hampshire Revised Stat. Ann., Sections 594: 2-3 (1955); Rhode Island Gen. Laws Ann. Section 12-7 and 2 (1956); Mass. Gen. Laws, Ch. 41, Sec. 98 (1932); New York Code of Crim. Proc. Sec. 180-a.

United States as binding on the question of when an arrest takes place, provides abundant reason, if this case presented no other compelling constitutional issues, for this Court to grant the application for certiorari in the case at bar. The juxtaposition of *Beck v. Ohio,* which applied federal standards of arrest to the states, and *Henry v. United States,* which set the standard as to when an arrest is effective, compel a square holding by this Court that any police restraint upon the liberty of any person, no matter how short its duration, is an arrest within Fourth Amendment strictures against illegal seizure of the person, and, if unaccompanied by probable cause, such arrest is violative of the Fourth and Fourteenth Amendments.

It requires little further discussion on this point but to note that the application of the *Henry* arrest rule to state criminal prosecutions via *Beck* compels a holding that the arrest in the case at bar was unconstitutional. For, in the instant case, the most charitable view of the arresting officer's knowledge of facts related to petitioners' guilt at the time of their original on-the-street detention is that, based upon his observation of conduct which was at least as susceptible to an innocent interpretation as a guilty one, he had a good faith suspicion, without objective corroboration of any sort, that petitioners were about to commit a crime. This Court has clearly and frequently pointed

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(Continued from preceding page)

Although Bonanno distinguished between detention and arrest, that decision was reversed on other grounds in Bufalino. In its opinion, the Bufalino court was careful to point out that it did not pass on the trial judge's ruling upholding the legality of the police procedures. *Id.* at 413, footnote 6. Furthermore, Judge Clark's concurring opinion notes that "the court's rulings supporting admissibility in United States v. Bonanno, * * * would seem at variance with Henry v. United States, * * * and the rationale there set forth * * *." *Id.* at 420, footnote 3.

out that neither simple belief,[63] good faith,[64] mere suspicion,[65] common rumor or even "strong reason to suspect" [66] on the part of the arresting officer is sufficient to demonstrate probable cause.

Should the Court depart from its position in *Henry* and rule that on-the-street detention is a form of sub-arrest beneath Fourth Amendment considerations, and that the detention of petitioners in the case at bar somehow survives constitutional attack, the illegality of the arrest here may be demonstrated by another route.

Whatever its determination as to the constructive custody in which a police officer holds a suspect when he stops and interrogates him, there can be little doubt that once the officer lays his hands on the suspect and uses force to exact involutary movement from him, philosophic and semantic distinctions between "arrest" and "detention" become (if they have not always been) hopelessly irrelevant.[67] On the instant facts, when, immediately after petitioner Terry gave his name to the arresting officer, the police officer grasped him with both hands and turned him around, the constructive physical restraint became actual. The arrest at that moment can scarcely be denied.

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[63] Nathanson v. United States, 290 U. S. 41 (1933).

[64] Henry v. United States, 361 U. S. 98 (1959).

[65] Henry v. United States, 361 U. S. 98 (1959); Draper v. United States, 358 U. S. 307 (1959); Brinegar v. United States, 338 U. S. 160 (1949).

[66] *Ibid.*

[67] See this language in Henry v. United States, 361 U. S. 98, 104 (1959): "Under our system suspicion is not enough for an officer *to lay hands on a citizen.*" And see Green v. United States, 259 F. 2d 180, 182 (D. C. Cir. 1958), *cert. denied,* 359 U. S. 917 (1959): "Had he remained standing where he was first accosted, or had he merely refused to talk, the police would have lacked probable cause either to arrest or to search him. The officers would have had no justifiable reason *to lay hands upon him.*"

So far as probable cause is concerned, the officer had but one more fact at the moment after his assertion of physical control over petitioner Terry than he had at the moment of original interrogation: the fact that when asked a question by a police officer the suspects gave a civil and relevant response, unaccompanied by obvious evasiveness, threatened or actual violence, or by flight—all of which admittedly may be factors bearing on probable cause.[68] Because of the non-violent and lawful nature of their responses, it may be concluded that the officer had even *less* reason to believe petitioners' guilt at the time he grasped petitioner Terry and spun him around than he had at the time of the original interrogation when he could not have known whether he would get a peaceable response from the suspects, or any.

Even after the arresting officer obtained what was undeniably probable cause against petitioner Terry (when he felt the weapon in Terry's clothing after his illegal arrest), the record is barren of any information whatever giving him probable cause to arrest petitioner Chilton and the other man, whose admitted arrests immediately followed.

If probable cause is a workable and useful concept to balance the citizen's right of privacy against police necessity, it ought not be relegated to a caricature of a stricture against law enforcement excesses, a status which must surely follow if police officers, with constitutional sanction, are permitted—rather, encouraged—to compel suspects, during a period of non-arrest, to disgorge incriminating information and evidence which will raise their suspicions to probable cause and thereby validate a

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[68] Husty v. United States, 282 U. S. 694 (1931); Green v. United States, 259 F. 2d 180 (D. C. Cir. 1958).

subsequent arrest. It is too late in the day and too destructive of constitutional values to attempt to "justify the arrest by the search and at the same time justify the search by the arrest." *Johnson v. United States,* 333 U. S. 10, 15 (1947).

If the protections of privacy derived from the Fourth Amendment are to remain meaningful, if they are not to be diluted beyond recognition and beyond the legitimate needs of law enforcement, Fourth Amendment standards should be applied in each instance of governmental restraint of the person of its citizenry, no matter how fleeting, without the substitution of semantic devices for constitutional requirements. For careful analysis "exposes the thinness of the claim that investigative arrests are essential to public safety. On the contrary, the practice of investigative arrests breeds resentment, discourages thorough police work, and sets an official standard of lawlessness." [69]

II.

THE FRISK FOR WEAPONS WAS AN ILLEGAL SEARCH.

Amicus has urged above (Argument I, *supra,* pp. 13-20) that the arrest, for purposes of constitutional analysis, occurred before the "frisk" for weapons, that it was an invalid arrest in the absense of probable cause to make it, and that the suppression of evidence obtained incidental thereto was thereafter constitutionally compelled. If the Court so holds, the legal analysis in this case is over. For it has never been seriously contended that a non-consensual warrantless search, without independent probable cause to search, may be justified by a contemporaneous unconstitutional arrest.

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[69] Joint Comm. on the District of Columbia, *Crime in the District of Columbia,* H. R. Rep. No. 176, 89th Cong., 1st Sess. 139 (1965) (minority views).

But even if this Court should somehow affirm the position taken by the courts below, and hold that the arrest occurred after the "frisk" for weapons had revealed enough information to the arresting officer to give him probable cause to support the subsequent arrest, the proponents of "stop and frisk" police conduct have yet another constitutional hurdle to overcome. Unless they can justify the "frisk" itself, the use in evidence of the "fruit of the frisk" [70] must be constitutionally forbidden, regardless of whether the arrest is determined to have taken place before or after the frisk, and regardless of whether the arrest was valid or invalid. For probable cause to justify any arrest in this case, early or late, must ultimately depend upon the information acquired by the arresting officer during the frisk itself.[71]

For those who seek to defend "stop and frisk" police activity against constitutional attack, the attempted justification of the "frisk" in constitutional terms is even more tenuous than constitutional sanction of the "stop." [72] The desperate attempt to exempt the "frisk" from the Fourth Amendment protections which have been evolving from this Court's decisions on search and seizure law

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[70] This poetic language is that of the trial court. See Appendix B, p. 43.

[71] It cannot be denied that the arresting officer had probable cause to arrest for carrying a concealed weapon once he felt the outline of the gun through petitioner Terry's topcoat. But since an earlier arrest must have been invalid as without probable cause, and a subsequent arrest could only have been valid if the information acquired by the arresting officer was *legally* acquired during the frisk, the constitutionality of the seizure of the weapon and its later use in evidence against the accused stands or falls on the independent validity of the "frisk." People v. Rivera, 14 N. Y. 2d 441, 449, 201 N. E. 2d 32, 37, 252 N. Y. S. 2d 458, 465, n. 1 (1964) (Fuld, J., dissenting), cert. denied 379 U. S. 978 (1964).

[72] Although the "stop"—arrest distinction is difficult enough. See Argument I, *supra*, pp. 15-18.

since *Boyd v. United States*, 116 U. S. 616 (1886)[73] has taken two forms. *First*, by semantic alchemy, it is denied that a "frisk" is a search and that the confiscation of the yield of the "frisk" is a seizure within the operation of the Fourth Amendment, even though such fruits may ultimately be introduced in evidence against the accused.[74] *Second*, even where it is conceded that the "stop" is a seizure of the person within the meaning of the Fourth Amendment and a "frisk" is a search within the conception of that same constitutional authority, both the "stop" and incidental "frisk" are sought to be justified, in the absence of probable cause, as "reasonable searches and seizures," under a test of "reasonableness" which, it is argued, is an interchangeable alternative to the requirement of probable cause.[75]

Each of these arguments will be discussed below.

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[73] The decided case law makes it clear why the application of Fourth Amendment doctrine to "stop and frisk" police conduct compels its rejection as unconstitutional. This Court has never constitutionally permitted a search in the absence of a showing of either probable cause to search, Wong Sun v. United States, 371 U. S. 471 (1963); Carroll v. United States, 267 U. S. 132 (1925); or probable cause to arrest, Beck v. Ohio, 379 U. S. 89 (1964); United States v. Rabinowitz, 339 U. S. 56 (1950). Where probable cause exists, no resort to such esoteric concepts as "stop and frisk" is necessary. Where probable cause is absent, no constitutional attack can be withstood.

[74] See People v. Rivera, 14 N. Y. 2d 441, 201 N. E. 2d 32, 252 N. Y. S. 2d 458 (1964), cert. denied 379 U. S. 978 (1964). And see the trial court's distinction in the instant case between a "frisking" which "is strictly for the protection of the officer's person and his life" and does not "go into [the] pockets" of the suspect, and a search which "[goes] into their pockets and produces evidence, as an example, narcotics or illegal slips * * *." Appendix B, p. 42.

[75] The American Law Institute has taken this view. See MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (Tent. Draft. No. 1, 1966).

A.

A "Frisk" Is a Search Within the Meaning of the Fourth Amendment.

The suggestion that a police officer who runs his hands over the *outside* clothing on the body of a suspect in the public street without his consent for the express purpose of determining what the suspect has concealed *inside* his clothing is conducting, not a *search*, but a *frisk*—a form of non-search or sub-search which defies Fourth Amendment proscription—would be ludicrous if its consequences were not so destructive of "the right to be let alone."

Judge Fuld, dissenting in *Rivera*,[76] has properly destroyed this attempted distinction:

> "This is nothing but an exercise in semantics; a search by any other name is still a search. Viewed in the perspective of constitutionally protected interests, a police tactic—call it a search or, more euphemistically, a 'frisk'—which leads to discovery of a gun in an individual's pocket by trespassing on his person is indisputably an invasion of privacy. A 'frisk' is a species of search and, in point of fact, both decisions and dictionaries so define it * * *.
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> "Free men should no more be subject to having the police run their hands over their pockets than through them. Neither the Fourth Amendment nor, for that matter, the common law of tort distinguishes * * * between a cursory search and a more elaborate one. In both instances, it is the slightest touching which is condemned, and the reason for this is the insult to individuality, to individual liberty, is as grave and as objectionable in the one case as in the other."[77]

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[76] Olmstead v. United States, 277 U. S. 438, 478 (1928) Brandeis, J., dissenting).

[77] People v. Rivera, 14 N. Y. 2d 441, 449-450, 201 N. E. 2d 32, 37, 252 N. Y. S. 2d 458, 466 (1964), cert. denied 379 U. S. 978 (1964).

Judge Fuld's dissent is wholly compatible with this Court's previously stated attitudes on the breadth of privacy of the citizen which is protected against governmental intrusion. Ever since this Court's decision in *Olmstead v. United States*, 277 U. S. 438 (1928), the litmus of governmental violation of the citizen's Fourth Amendment right of privacy has been whether there was a *physical trespass* into the protected zone. Even the slightest physical trespass is sufficient to evoke the protections of the Fourth Amendment,[78] whether accompanied by rummaging or not.[79] In the instant case, the arresting officer grasped petitioner Terry, spun him around and patted his clothing. The physical trespass to the person—the insult to his privacy—is apparent.

The courts below in the instant case further attempted to justify the distinction between a "frisk" and a search by noting the officer's primary purpose in invading the privacy of the suspect. "A search is primarily for the purpose of trying to obtain evidence," while "a frisking is strictly for the protection of the officer's person and his life." [80] "[P]olice officers seem unanimous in stating that frisking is done for self-protection and not as a mere evidentiary

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[78] *E.g., Silverman v. United States*, 365 U. S. 505 (1961) (spike of "spike mike" extended several inches into party wall of accused; held: Fourth Amendment violated); Regalado v. California, 374 U. S. 497 (1963) reversing 193 Cal. App. 2d 437 (1961) (peeping through hole bored in hotel room door; held: Fourth Amendment violated); Clinton v. Virginia, 377 U. S. 158 (1964), *reversing* 204 Va. 275, 130 S. E. 2d 437 (1963) (microphone not driven into party wall, but merely stuck in it by a thumbtack; held: Fourth Amendment violated); cf., Katz v. United States, 369 F. 2d 130 (9th Cir. 1966) *cert. granted* 35 U. S. L. Week 3262 (No. 895, Oct. term 1966).

[79] Chapman v. United States, 365 U. S. 610 (1961); and see United States v. Merritt, 293 F. 2d 742 (3rd Cir. 1961); Work v. United States, 243 F. 2d 660 (D. C. Cir. 1957).

[80] See opinion of trial court, Appendix B, p. 42.

fishing expedition." [81] To make distinctions in constitutional treatment turn upon the police officer's subjective motive—whether in fact he seeks a weapon or other evidence—is to disregard constitutional history and make a shambles of Fourth Amendment protections. For this Court has "had frequent occasion to point out that a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success." *United States v. DiRe*, 332 U. S. 581, 595 (1948). And it is clear that once "frisking" for weapons is authorized, seizure of other evidence during this sanctioned invasion of privacy will soon follow, and with judicial blessing. See *Harris v. United States*, 331 U. S. 145 (1947).

The experience in New York following the justification of a police "frisk" for weapons in the absence of probable cause to arrest or search in *People v. Rivera* is illustrative of the danger. After permitting the patting of the outer clothing for weapons as a "frisk" which was "justified as an incident to inquiry upon grounds of elemental safety and precaution which might not initially sustain a search" [82] the New York courts justified, in identical fashion, the "frisk" of a brief case belonging to a suspect who was already in the custody of three police officers in an automobile [83] and the "frisk" of an entire automobile.[84] Moreover, "frisking" justified as a search for dangerous weapons to protect the life of the arresting officer has been extended, with judicial approval, to a

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[81] See opinion of court of appeals, Appendix C, p. 53.

[82] People v. Rivera, 14 N. Y. 2d 441, 201 N. E. 2d 32, 252 N. Y. S. 2d 458 (1964), cert. denied 379 U. S. 978 (1965).

[83] People v. Pugach, 15 N. Y. 2d 65, 204 N. E. 2d 176 (1964) cert. denied 380 U. S. 936 (1965).

[84] People v. Cassese, 263 N. Y. S. 2d 734, 47 Misc. 2d 1031 (N. Y. City Crim. Ct. 1965).

general search of the person of the suspect for other evidence.[85] The experience in California is not dissimilar.[86] The development of the case law in these two states demonstrates how, all too frequently, "a hint becomes a suggestion, is loosely turned into a dictum and finally elevated to a decision." [87]

The attempt to withdraw searches of a particular variety from the operation of the Fourth Amendment by a process of nomenclature and classification is both sterile and dangerous. Calling a search a "frisk" and excluding it from Fourth Amendment controls because of its label is a form of non-analysis which will survive neither logic, common experience, nor the decided case law of this Court in the area of individual privacy. The greatest danger of such a device, however, is its destructive effect upon one of the basic guarantees which a society, if it is to remain free, must provide each citizen—the right to walk the public streets secure in the knowledge that, without probable cause to do so, the police cannot put their hands on his body for any purpose.

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[85] People v. Sibron, 18 N. Y. 2d 603, 219 N. E. 2d 196 (1966) probable juris. noted 35 U. S. L. Week 3321 (U. S. March 14, 1967) (package of heroin); People v. Peters, 18 N. Y. 2d 638, 219 N. E. 2d 595 (1966) (burglar's tools); People v. Norris, 258 N. Y. S. 2d 967, 46 Misc. 2d 44 (Sup. Ct. Kings County, 1965) (26 marijuana cigarettes); People v. Reason, 35 U. S. L. Week 2362 (N. Y. Sup. Ct. Dec. 21, 1966) (narcotics in a tin box).

[86] E.g., People v. Machel, 234 Cal. App. 2d 37, 44 Cal. Reptr. 126 (1st Dist. Ct. of App. 1965), *cert. denied*, 382 U. S. 839 (dictum) (three marijuana cigarettes); People v. Garrett, 238 Cal. App. 2d 292, 47 Cal. Reptr. 731 (3rd Dist. Ct. App. 1965) (stolen coins).

[87] United States v. Rabinowitz, 339 U. S. 56, 75, (1950) (Frankfurter, J., dissenting).

B.

A "Frisk" in the Absence of Probable Cause Is Not a Reasonable Search Within the Meaning of the Fourth Amendment.

Once it has been determined that a frisk is, in fact and law, a search within the operation of the Fourth Amendment, those who seek constitutional justification for police frisks without either a contemporaneous valid arrest, a search warrant or probable cause to search, urge that such frisks are "reasonable" police conduct; since the Fourth Amendment prohibits only "unreasonable searches and seizures," the reasonableness of the police conduct is a constitutionally adequate substitute for probable cause, and the "frisk" is therefore (the argument runs) a valid search.

This contention has novelty, if not authority, to support it. But *amicus* urges not only a dearth of case support for such a claim, but, more important, that the adoption of such a construction of the Fourth Amendment would effectively eviscerate the right of privacy it was designed to protect.

Our analysis must begin with the language of the Fourth Amendment itself.[88] It contains two clauses: a prohibition of unreasonable searches and seizures (referred to here as the "reasonableness" clause) and a description of the necessary attributes of a valid warrant (referred to here as the "warrants" clause). Because the relationship between these two clauses is not clear, either

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[88] "The right of the people to be secure in their *persons*, houses, papers, and effects, against *unreasonable searches and seizures*, shall not be violated, and no *Warrants* shall issue but, upon *probable cause*, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U. S. Const. Amendment IV.

from the express language of the Fourth Amendment, or from its constitutional history, there has been some conflicting interpretation of their interacting effect upon each other in the decided cases.

In *Trupiano v. United States*,[89] this Court interpreted the "warrants" clause to be paramount to the "reasonableness" clause by holding that a search conducted without a warrant, where the police had adequate time and opportunity to obtain one, was not a "reasonable" search. Scarcely two years later, in *United States v. Rabinowitz*,[90] the Court reversed *Trupiano* and held the "reasonableness" clause to be of primary importance in determining when a search satisfied Fourth Amendment requirements. To substitute for the test of practicality of obtaining a search warrant, enunciated in *Trupiano*, the Court articulated a pluralistic rule of "reasonableness" of police conduct, of which practicality of obtaining a warrant was only a single factor. On the facts of *Rabinowitz*, this rule of reasonableness permitted the Court to find a valid search even though the police had ample opportunity to procure a warrant, but failed or refused to do so.

Regardless of the merits of the "reasonableness" test,[91] it is clear that it was designed solely for the purpose

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[89] 334 U. S. 699 (1948).

[90] 339 U. S. 56 (1950).

[91] See the biting dissent of Frankfurter, J. in Rabinowitz, 339 U. S. 56, 83 (1950): "There must be a warrant to permit search, barring only inherent limitations upon that requirement when there is a good excuse for not getting a search warrant * * *. It is for this Court to lay down criteria that the district judges can apply. It is no criterion of reason to say that the district court must find it reasonable * * *." And see United States v. Ventresca, 380 U. S. 102 (1965); Beck v. Ohio, 379 U. S. 89 (1964); Preston v. United States, 376 U. S. 364 (1964); and Chapman v. United States, 365 U. S. 610 (1961) in which the *Trupiano* requirement of police necessity to excuse failure to obtain a search warrant appears to be re-emerging.

of determining *when a warrantless search might be constitutionally justified* and *not as an excuse for probable cause*. The difference between the two approaches involved the relative importance assigned to procuring a warrant. Never was there any suggestion that any search *in the absence of probable cause* could meet the criterion of reasonableness. And for good reason.

If the "warrants" clause requires a *warrant* to be based upon probable cause in order to be valid, how could a lesser standard be applied to *warrantless* search by virtue of the "reasonableness" clause? Why would any police officer ever elect to seek a warrant before making a search if he were held to a lesser standard in a warrantless search than in a search pursuant to a valid warrant? If the framers did not regard a warrant as "a requirement for a piece of paper" [92] but as an important bulwark against government invasion of privacy, and if probable cause is so essential an element of a valid warrant, why provide a means of bypassing the probable cause requirement of the "warrants" clause in the "reasonableness" clause which immediately precedes it?

The posing of these questions amply refutes the strained interpretation of the Fourth Amendment which would limit the requirement of probable cause only to searches with a warrant. The only interpretation of the Fourth Amendment which conforms to this Court's past decisions and which leaves it a vital document in the protection of individual privacy and human dignity is that, all searches, with or without a warrant, are unreasonable unless accompanied by probable cause.

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[92] United States v. Rabinowitz, 339 U. S. 56, 69 (1950) (Frankfurter, J., dissenting).

Thus, our analysis of the "frisk" as a Fourth Amendment violation returns to its place of beginning. A frisk must be a search as that term is used in the Fourth Amendment. And as a search it cannot be a reasonable search unless it is accompanied by probable cause to arrest or search. Since, in the case at bar, neither probable cause to arrest nor probable cause to search could be shown, except by use of the yield of the frisk itself, the frisk of petitioners was an unreasonable search and its yield should have been suppressed by command of the Fourth and Fourteenth Amendments. Although "wherever a culprit is caught red-handed * * * it is difficult to adopt and enforce a rule that would turn him loose," [93] the preservation of Fourth Amendment values should be sufficient impetus to cause the Court to do its duty.

III.

PROTECTION OF POLICE OFFICERS CANNOT JUSTIFY THE USE OF THE YIELD OF THE FRISK IN EVIDENCE AGAINST PETITIONERS.

Amicus has demonstrated (Argument II, *supra*, pp. 20-30) that a frisk for weapons without probable cause to arrest or search is an unreasonable search expressly prohibited by the Fourth Amendment. It follows that the yield of such a search must be suppressed by virtue of the exclusionary rule made applicable to the states in *Mapp v. Ohio*, 367 U. S. 643 (1961).

But the sponsors of exceptional constitutional treatment for such frisks urge that society's substantial interest in protecting the lives of its law enforcement authorities in the course of their investigation of crime compel relaxation of settled constitutional principles to achieve this im-

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[93] Draper v. United States, 358 U. S. 307, 314 (1959) (Douglas, J., dissenting).

portant societal purpose. They urge that such searches are necessary for crime investigation and police protection, that they are therefore not constitutionally infirm, and that, as a result, the exclusionary rule does not reach their fruits. Because everyone is quite correctly concerned with the safety of the police in the performance of their dangerous and highly important function of preserving order, the argument has a certain surface appeal.

Upon closer inspection, however, the argument disintegrates entirely. For it is apparent that long after any danger to the police officer is over, the use of the seized evidence to convict the suspect in a subsequent prosecution, made possible by a claim of police urgency, achieves an otherwise unconstitutional result under the most non-emergency conditions. To allow government to profit beyond its legitimate interest in a narrow exception to a rule of broad constitutional prohibition is to pay a reward for constitutional violation.

Amicus contends that (A) adequate exceptions for police necessity already exist in the Fourth Amendment case law, and that the addition of new ones in the "stop and frisk" sphere are not necessary for the protection of legitimate police interests, (B) public policy which permits the otherwise unconstitutional police searches to achieve a limited object—the protection of police safety—is in no way furthered by admitting the yield of such searches in evidence to convict the accused in subsequent criminal proceedings, and (C) as a practical matter, the use in evidence of the yield of searches made in violation of clear Fourth Amendment principle would provide great incentive for police officers, under the guise of self-protection, to make general searches of the person, thus frustrating the great purposes of the Fourth Amendment which the exclusionary rule was designed to protect.

Each of these contentions will be considered below.

A.

There Is No Legitimate Police Need for the "Frisk" Exception to Fourth Amendment Protections.

When police necessity is urged as a ground for legitimizing frisks without probable cause, the listener has the unerring feeling that he has heard the argument somewhere before. A casual search (or frisk) through this Court's decided cases reveals the source of this *déjà vu* impression. For it was precisely this argument that was made to obtain this Court's approval of the warrantless search incidental to a valid arrest, an exception to the general requirement that searches must be by warrant.[94]

Originating as a dictum justifying the search of the person of an accused pursuant to valid arrest,[95] it was expanded to include the immediate place of arrest[96] and the entire four-room apartment of an accused who was arrested in one of the rooms.[97] Although the "incidental search" exception to the requirement of a warrant has gone far beyond its origins and, perhaps, its rationale,[98] there is

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[94] "Unquestionably, when a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime * * *. This right to search and seize without a search warrant extends to things under the accused's immediate control * * * and, to an extent depending on the circumstances of the case, to the place where he is arrested * * *." Preston v. United States, 376 U. S. 364, 367 (1964). Also see Schmerber v. California, 384 U. S. 770 (1966); United States v. Ventresca, 380 U. S. 102 (1965); United States v. Rabinowitz, 339 U. S. 56 (1950); Harris v. United States, 331 U. S. 145 (1947); Marron v. United States, 275 U. S. 192 (1927); Agnello v. United States, 269 U. S. 20 (1925); and Weeks v. United States, 232 U. S. 383 (1914).

[95] Weeks v. United States, 232 U. S. 383 (1914).

[96] Agnello v. United States, 269 U. S. 20 (1925).

[97] Harris v. United States, 331 U. S. 145 (1947).

[98] See Justice Frankfurter's strong critique of the extension of the "incidental search" rule in his dissent in United States v. Rabinowitz, 339 U. S. 56, 68-86 (1950).

no denying the fact that it was originally conceived as a means of protecting the arresting officer against attack by concealed weapons and as a means of preventing the immediate destruction of fruits or instrumentalities of crime.[99]

Never, until the "stop and frisk" cases, however, has there been any claim that an officer may protect an *invalid* arrest or evidence for which he was *not* entitled to search.

Amicus submits that the warrantless search of the person and the area within his immediate control permitted incident to a contemporaneous valid arrest is sufficient recognition of the police officer's legitimate need to protect himself, without fashioning new exceptions to Fourth Amendment principle which would eliminate the need for "some valid basis in law [to justify] the intrusion" of arrest or search.[100]

B.

No Legitimate Public Policy Is Served by Allowing in Evidence the Fruits of a Search Which, But For the Protection of the Police Officer, Would Have Been an Unconstitutional Search.

It must be conceded at the outset that a warrantless search or frisk, although unconstitutional because of the absence of either probable cause to search or a lawful

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[99] "The rule allowing contemporaneous searches is justified * * * by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control." Preston v. United States, 376 U. S. 364, 367 (1964). Also see United States v. Rabinowitz, 339 U. S. 56 (Frankfurter dissent at page 72) (1950); Palmer v. United States, 203 F. 2d 66, 67 (D. C. Cir. 1953); and Note, 17 BAYLOR L. R. 312 (1965).

[100] Johnson v. United States, 333 U. S. 10, 17 (1948).

arrest, may, in fact, provide some measure of bodily protection to the searching officer if the suspect is carrying a weapon. For this reason, a society concerned for the welfare of the police may be reluctant, even if otherwise convinced, to brand police searches for self-protection—no matter what the illegality of the police officer's conduct or the seriousness of the invasion of privacy—illegal. *Amicus* is not here concerned with the labelling of such police conduct for general, moral or legal purposes. It urges only that such searches, if not accompanied by a valid arrest or probable cause, are unconstitutional for purposes of the exclusionary rule.

The legislatures may, in their judgment, elect to indemnify police officers against civil suits brought by persons whose privacy was thus invaded, or cloak them with other legal protections they deem necessary or desirable.[101]

But whether this Court or some other judicial authority chooses, for purposes of its own, to call such searches good or bad, or (by calling them non-searches) irrelevant, it is clear that, so far as the exclusionary rule is concerned, they are bad.[102] For once the weapon is found and confiscated, and the suspect is disarmed, the stated purpose of the search—the bodily protection of the police officer—has

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[101] Experience, however, suggests that existing remedies against police officers for illegal searches and seizures, apart from the use of the exclusionary rule itself, pose little threat to illegal police conduct. See Murphy, J., dissenting in Wolf v. Colorado, 338 U. S. 25, 41-44 (1949).

[102] *Amicus* does not wish to appear too sanguine about the prospect of unrestricted police frisks even in the absence of subsequent convictions based upon the incriminating evidence so obtained. Absent probable cause, they are invalid and this Court's clear statement to this effect would no doubt be useful. The clearest deterrent to such conduct, however, is the vigorous operation of the exclusionary rule, in order to frustrate any purpose of such a search other than the stated one—self-protection. See argument III (C), *infra*, pp. 35-37.

been accomplished.[103] The subsequent admission of the weapon or other fruits of the search furthers the protection of the police officer not one bit; it merely makes the government the beneficiary of a search which, but for a purpose which is no longer operative, would have been struck down as a Fourth Amendment violation. Such intellectual trickery, designed and enforced by governmental authority to bypass its own constitutional rules, breeds nothing but contempt for law and legalisms. By such technical and moral hypocrisy as this, those who have been brutalized by our society and who are already taking to the streets in ever-increasing numbers to effect social change, will be finally alienated from seeking redress of their grievances in more orderly fashion. This Court's obligation not to emasculate the exclusionary rule for the convenience of the police force is thus a matter of practical, as well as moral, necessity in a society in flux.

C.

The Deterrent Effect of Strict Application of the Exclusionary Rule Will Keep Invasions of Privacy to a Practical Minimum.

The Court of Appeals below has stood logic upon its head in pointing out, as part of its rationale for refusing to enforce it, that vigorous application of the exclusionary rule in the "stop and frisk" area will have no deterrent effect upon police officers who, not wishing to commit suicide, will continue to frisk suspects for weapons, no matter what courts choose to do with the resulting evi-

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[103] It is not here suggested that, even if the search is invalid, the officer is obliged to return dangerous weapons taken from the suspect. See One 1958 Plymouth Sedan v. Pennsylvania, 380 U. S. 693 (1965).

dence.[104] Such reasoning does not consider the possibility that there may be some law enforcement personnel within the court's jurisdiction who, in an excess of zeal, might be inclined to engage in general exploratory searches of the persons of suspects for purposes of general harassment and to see what incriminating evidence they can find, even though they may have no reason at all to fear an assailant's bullet.[105] This premise of the Court is fully exposed to public view.[106] Those of us who are not as convinced that the police will use their vast power with such unanimous *bona fides*, but who adhere instead to the principle announced by this Court, that "[p]ower is a heady thing; and history shows that the police acting on their own cannot be trusted," [107] must disassociate ourselves from the

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[104] Paraphrasing will not do justice to the reasoning of the Court of Appeals on this point. "The Mapp exclusionary rule was imposed upon the states not because of some command inherent in the fourth amendment, but rather because the Supreme Court believed that it was the only way the police could be forced to respect the fourth amendment. If the police could not obtain a conviction using evidence unlawfully obtained, they would have no incentive to conduct illegal searches. If we keep in mind this raison d' etre of the exclusionary rule, we can guard against confusion in the attendant rules that are developed. *A judicial rule rendering evidence produced as a result of a frisk inadmissible would fail to deter the police from frisking suspects believed to be armed as police frisk for their own protection rather than for the purpose of looking for evidence.* A rule of admissibility in such cases could only result in allowing the armed criminal to go free although failing to any meaningful extent to protect individual liberty." See Appendix C, p. 55.

[105] *Amicus* means no disrespect to local law enforcement authorities but is unable to accept the obverse supposition that all police officers who would entertain such thoughts are presently employed in New York and California. See cases cited in footnotes 85, 86, *supra*.

[106] The Court of Appeals opinion disingenuously notes that "police officers seem unanimous in stating that frisking is done for self-protection and not as a mere evidentiary fishing expedition." See Appendix C, p. 53.

[107] McDonald v. United States, 335 U. S. 451, 456 (1948).

rosy view of law enforcement embraced by the Court of Appeals.

Amicus is constrained to observe that had police officers been such staunch adherents to the constitutional limitations imposed upon their conduct as the Court of Appeals supposes, the exclusionary rule of *Mapp v. Ohio*[108] and the restrictions upon police conduct which followed *Mapp*[109] would have been totally unnecessary.

Assuming therefore, that some general exploratory searches might result under the guise of self-protection, it seems perfectly clear that the incentive for such unconstitutional police conduct would be materially reduced by vigorous application of the Fourth Amendment exclusionary rule. If law enforcement authorities know that weapons and other evidence seized during the course of an unconstitutional frisk will be inexorably suppressed by constitutional command, the number of unconstitutional invasions of privacy will be reduced, at very least, to those instances where the officer genuinely fears for his safety.

And thus the threat of "stop and frisk" police procedures, another of the new devices "that have emerged from century to century wherever excessive power is sought by the few at the expense of the many" [110] will be laid to rest.

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[108] 367 U. S. 643 (1961).

[109] *E.g.*, Miranda v. Arizona, 384 U. S. 436 (1966); Escobedo v. Illinois, 378 U. S. 478 (1964); Massiah v. United States, 377 U. S. 201 (1964).

[110] Black, J., dissenting in Adamson v. California, 332 U. S. 46, 89 (1947).

CONCLUSION.

Amicus has urged the constitutional infirmity of the on-the-street detention as an illegal arrest, the invalidity of the accompanying "frisk" as an unreasonable search and the logical barrenness of the attempted justification of both in the name of crime prevention and the safety of the interrogating officer. Despite the clamor of the constabulary to the contrary, the highly critical area of on-the-street arrests and accompanying searches demands, no relaxation of Fourth Amendment standards, but vigorous adherence to them. Otherwise, "a method will have been devised by which the Fourth Amendment's prohibition against unreasonable searches and seizures may be evaded and the exclusionary rule of *Mapp v. Ohio,* * * * to a large extent, written off the books." [111]

Amicus joins in, and calls upon this Court to make its own, the stirring language of Judge Fuld:

> "* * * The loss of liberty entailed in authorizing a species of search on the basis of mere suspicion is too high a price to pay for the small measure of added security it promises. Other methods are available whereby the police may protect themselves while carrying on their investigations, other procedures which, if utilized, will safeguard the police and the community from the criminal minority without destroying the sense of dignity and freedom with which the law-abiding majority walk the streets.
>
> "To what end security if liberty be sacrificed as its price? The privacy which the Constitution guarantees is assured to the best of men only if it is vouchsafed to the worst, however distasteful that may be. Thus, although the defendant before us undoubtedly merits

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[111] Fuld, J., dissenting in People v. Rivera, 14 N. Y. 2d 441, 448, 201 N. E. 2d 32, 36 (1964).

the punishment provided by law for carrying a concealed weapon, I venture that it is better that he go free than that we sanction a significant inroad on the rights of all our citizens." [112]

Respectfully submitted,

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[112] *Id.* at 452-453, 201 N. E. 2d at 39.

APPENDIX A.

JUDGMENT ENTRY OF SUPREME COURT OF OHIO.

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutionel question exists herein.

APPENDIX B.

OPINION OF THE COURT OF COMMON PLEAS OF CUYAHOGA COUNTY, OHIO.

FRIEDMAN, *J.* Gentlemen, it was suggested yesterday that briefs be filed and I stated that it was not necessary, in light of the fact that I have given this matter considerable attention as to the law, and the only question before me was to determine the facts so the proper law can be applied.

There is no question about the facts in this case, so I don't think it is necessary for me to repeat at length save and except to state that the police officer of many years of service and experience had observed the action of the defendants which indicated to him that they were casing a robbery.

There is no doubt in my mind that the officer, based upon his training, length of service, and experience as a police officer and detective, assigned in the area which he had been placed, and doing the job he had been doing, had reasonable cause to believe and to suspect that the defendants were conducting themselves suspiciously and some interrogation should be made of their action.

The Supreme Court of the United States has in many cases of recent years expressed itself clearly and distinctly that a general search and seizure is in violation of the Fourth Amendment unless the search is done with a proper warrant from the court, or if the search is made in connection with a lawful arrest and is contemporaneous and incidental to such arrest. *Henry v. U. S.*, 361 U. S., 98, 4 L. Ed. (2d), 134. *Ker v. California*, 374 U. S., 23, 10 L. Ed. (2d), 726. *Mapp v. Ohio*, 367 U. S., 643, 6 L. Ed. (2d) 1081.

There is no evidence that any warrant had been issued for a search or frisk and I am not going to stretch the facts and say that there was a lawful arrest prior to the frisk of the defendants. I believe it would be stretching the facts beyond reasonable comprehension and foolhardy to say there was a lawful arrest, because there wasn't, from the facts as presented.

It has been frequently stated by the U. S. Supreme Court that a state may establish its own rules and standards pertaining to search and seizure so long as these rules and standards do not violate the substance and spirit of the Fourth Amendment. It would certainly follow that the same rule would apply to the problem of "stopping and frisking" of an individual by a police officer where the facts justify.

In the case of *Ker v. California*, 374 U. S., 323, 10 L. Ed. (2d), 726, the court pronounced: "A state is not precluded from developing workable rules governing searches to meet the practical demands of effective criminal investigation and law enforcement that does not violate the constitutional standards of what is reasonable search and seizure."

Our courts in Ohio have on many occasions expressed that a police officer has the right to stop a suspicious per-

son for the purpose of interrogation. Therefore, can it be said that the frisking of said person by the officer for the purpose of his own safety is a standard set by our state that is violative of the Fourth Amendment, or is it a proper guidance to meet the practical demands of effective criminal investigation and the safety of the officer performing his sworn duty? This Court believes that it is the latter view that would be prevailing and that such conduct would not be held as a violation of the Fourth Amendment.

We cannot forego and forget that police officers have a job to do, and they must do the job in connection with crime which has been on the increase.

At the same time a police officer cannot—as far as this Court is concerned—and will not be permitted to stop and frisk an individual simply because he has a suspicion, a mere suspicion, unless they are reasonable circumstances justifying a frisk.

This Court believes there is a distinction between stopping and frisking, and search and seizure.

A search is primarily for the purpose of trying to obtain evidence in connection with the commission of a crime, that the police officer may reasonably believe that a crime has been committed or might be committed.

A frisking is strictly for the protection of the officer's person and his life.

There was reasonable cause in this case for the officer, Detective McFadden, to approach these individuals and pat them. He approached them, and for his own protection frisked them. He did not go into their pockets. Had he gone into their pockets and obtained evidence, as an example, narcotics or illegal slips, there would be no question of an illegal search and seizure.

He merely tapped them about the outer part of their bodies to determine if they had any weapons or guns, for

his own personal protection, and by doing so he discovered that two of the three individuals had concealed guns, and the guns are the fruit of the frisk, and not of a search.

In the case of *People v. Rivera* (7/10/64) decided by New York Court of Appeals, 33 U. S. Law Week, 2044, July 28, 1964, the court stated that a policeman has the authority to stop and question a suspect. "Prompt inquiry into suspicious or unusual conduct is an indispensable power in the orderly government of large urban communities."

The frisk is essential to the stop for without the latter the answer to the police officer may be a bullet, and a loaded pistol discovered during the frisk is admissible.

In the case of *People v. Martin,* 46 Cal. (2d), 106, the court similarly upheld stop and frisk by an officer, and the court in effect stated the security of public order and lives of the police are to be weighed against a minor inconvenience and petty indignity.

I may say at this time, I am a great believer of the personal rights propounded by our Supreme Court, reiterated and reaffirmed, neglected over the years, and given to us under the Fourth Amendment, the Fourteenth Amendment, and other amendments of the U. S. and State Constitutions.

But police officers in a community also have rights under the Constitution, and rights given to them by virtue of their office, and one of their rights as I have indicated is the right when the circumstances justify and there is a reasonable suspicion, and for his own personal protection, to stop the individual or individuals and not search, but to frisk, to determine if there are weapons for his own personal safety; and finding the weapon by frisking is the fruit of the stop and frisk, in the same relation that the courts refer to the fruits of the crime on a search and seizure.

Ballard v. State, 43 Ohio St., 340; *Clark v. DeWalt*, 65 Ohio Law Abs., 193, 203.

I believe that I reiterate again that search and seizure law cannot be applied in this particular case, although Mr. Reuben Payne endeavored to show there was a lawful arrest, but the Court cannot agree. If there was an arrest it came subsequent to the frisk.

But as I have stated, and I repeat again, there is a distinction between a frisk and a search and seizure.

This matter is of great importance and of great concern, and I certainly hope that counsel will endeavor to have this question determined by the Appellate Courts, for it is most desirable that we have clearness with respect to this problem and that police officers know what they may do and can do in a stop and frisk matter.

The motion in each case is overruled, and exception to the defendants. It is so ordered.

APPENDIX C.

OPINION OF THE COURT OF APPEALS OF OHIO, CUYAHOGA COUNTY, EIGHTH DISTRICT.

SILBERT, *C. J.*

This is an appeal on questions of law from a judgment and sentence imposed by the Court of Common Pleas of Cuyahoga County.

John W. Terry, the appellant herein, was indicted on a charge of carrying a concealed weapon, in violation of Section 2923.01, Revised Code. A pre-trial motion to suppress the evidence was denied, and, upon a plea of not guilty, the court, sitting without a jury, returned a verdict of guilty.

The relevant facts are as follows: At approximately 2:30 in the afternoon of October 31, 1963, a Cleveland detective with thirty-nine years of experience observed two persons, later identified as John W. Terry and Richard D. Chilton, engaged in behavior, on the corner of East 14th Street and Euclid Avenue (in downtown Cleveland), which immediately attracted his attention and aroused his suspicions. Positioning himself across the street he observed these men for approximately ten to twelve minutes as they alternately left the corner on which the other was stationed, walked several hundred feet up the Huron Road block, peered into the window of either a jewelry store or an airline office and then returned to the corner to converse with the other. In turn the other person would leave the corner, repeat these actions and return to the corner. This procedure was repeated at least two to five times by both men. During this period, a third man, later identified as Carl Katz, approached the corner, spoke briefly to the two men and then departed.

After ten to twelve minutes of this behavior, Terry and Chilton left the corner and proceeded west on Euclid Avenue several hundred feet to where they again met Katz. The three then engaged in a conversation. As the detective testified: "* * * I didn't like their actions on Huron Road, and I suspected them of casing a job, a stick-up * * *." With this belief in mind, the detective approached the three men, identified himself and asked for their names. Receiving only a mumbled response, the detective turned the defendant around, quickly "patted down" the outside of his clothing, and, perceiving a hard object in the inner breast pocket of his topcoat, inserted his hand and removed a fully loaded automatic. At this point the detective ordered the three men into a store, told them to face the wall and yelled to a store clerk to

"call the wagon." He then proceeded to "pat down" Chilton and upon perceiving a hard object in the lefthand pocket of his topcoat, inserted his hand and removed a fully loaded revolver. A similar "patting down" of Katz revealed nothing. The three men were then taken to the police station where Terry and Chilton were charged with carrying concealed weapons. Separate trials were ordered and after a motion to suppress was denied, the defendant Terry was convicted of a felony under Section 2923.01; Revised Code.

In the defendant appellant's brief, the following assignments of error are made:

> 1. The Court erred in not sustaining defendant's Motion to Suppress upon making its finding that the arrest herein was illegal.
>
> 2. The Court erred in refusing to apply constitutional guarantees prohibiting illegal searches and seizures and substituting therefor a doctrine of stop and frisk. The fourth amendment to the United States Constitution provides:
>
> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

This amendment prohibits an arrest without "probable cause," *Wong Sun vs. United States,* 371 U. S. 471 (1962), and is applied against the states through the fourteenth amendment. *Wolf vs. Colorado,* 338 U. S. 25 (1949).

However, the ambiguous nature of the word "arrest" and the issue of the right of the police to stop a person in a public street and question him under circumstances that

would reasonably call for investigation and inquiry present complex legal questions in the factual context of this case. Consequently, the initial question to be resolved is the authority of the detective in the circumstances shown here to stop and question the defendant. The validity of the subsequent police action and the determination of whether the detective had adequate "reasonable grounds" to make the arrest will hinge, in part, on the propriety of this initial inquiry.

The right of the proper authorities to stop and question persons in suspicious circumstances has its roots in early English practice where it was approved by the courts and the common law commentators. See, 2 *Hawkins, Pleas of the Crown,* 122, 129 (6th Ed. 1787): 2 *Hale, Pleas of the Crown,* 89, 96-97 (Amer. Ed. 1847): *Lawrence vs. Hedger,* 3 Taunt. 14, 128 Eng. Rep. 6 (C. P. 1810). Today, in several states, the authority of police officers to detain suspects for a reasonable time for questioning is granted by statute. E.g., N. Y. Code of Crim. Pro., Sec. 180A (1965 Supp.): Gen. Laws of R. I., Sec. 12-7-1 (1956): N. H. Rev. Stat. Ann., Ch. 594, Sec. 2 (1955): 11 Del. Ann. Code, Sec. 1902 (1953): Warner, The Uniform Arrest Act, 28 Va. L. Rev. 315 (1942): Mass. Gen. Laws, Ch. 41, Sec. 98 (1961). In others, the right is recognized by court decisions. E.g., *People vs. Rivera,* 14 N. Y. (2d) 441 (1964): *Gisske vs. Sanders,* 9 Cal. App. 13 (1908): *People vs. Fagenkrantz,* 21 Ill. (2d) 75 (1961).

The United States Supreme Court, however, has never squarely decided whether the police may constitutionally stop and question a suspect without his consent in the absence of adequate grounds for arrest. However, the lower federal courts permit such field interrogations. See, *Henry vs. United States,* 361 U. S. 98, 106 (1959) (Clark, J. dissenting): *Brinegar vs. U. S.,* 338 U. S. 160, 178

(1949) (Burton, J. concurring): *Keiningham vs. United States*, 307 F. (2d) 632 (D. C. Cir. 1962), cert. den. 371 U. S. 949 (1963): *Busby vs. United States*, 296 F. (2d) 328 (9th Cir. 1961), cert. den. 369 U. S. 876 (1962). The cases also indicate that an officer may stop and question even though he has insufficient grounds to make an arrest. See, *Ellis vs. United States*, 264 F. (2d) 372 (D. C. Cir.), cert. den. 359 U. S. 998 (1959): *United States vs. Bonanno*, 180 F. Supp. 71, 78 (S. D. N. Y. 1960), rev'd on other grounds sub nom., *U. S. vs. Buffalino*, 285 F. (2d) 408 (2d Cir. 1960), cited with approval in *U. S. vs. Vita*, 294 F. (2d) 524, 530 (2d Cir. 1961).

Admittedly there is some division of authority on the legality of the right to stop and question; however, the better view seems to be that the stopping and questioning of suspicious persons is not prohibited by the Constitution. See, Note, 50 *Cornell L. Q.* 529, 533 (1965); *United States vs. Vita*, 294 F. (2d) 254 (2d Cir. 1961), cert. den. 369 U. S. 823 (1962). Of great persuasive authority do we consider the long line of California cases, decided under the rule of *People vs. Cahan*, 44 Cal. (2d) 434 (1955) in which this practice has been upheld. E.g., *People vs. Martin*, 46 Cal. (2d) 106 (1956); *People vs. Simon*, 45 Cal. (2d) 645 (1955); *People vs. Jones*, 176 Cal. App. (2d) 265 (1959): Also of great persuasive authority is the recent New York Court of Appeals decision in *People vs. Rivera*, 14 N. Y. (2d) 441 (1964) wherein this practice was also upheld. The courts of Ohio do not appear to have been squarely presented with this problem before. Therefore, we hold, in line with the great weight of authority, that a policeman may, under appropriate circumstances such as exist in this case, reasonably inquire of a person concerning his suspicious on-the-street behavior in the absence of reasonable grounds to arrest.

An individual who acts in a suspicious manner invites a preliminary inquiry by the proper authority. It does not unreasonably invade the individual's right to privacy to hold that the price of indulgence in suspicious behavior is a police inquiry. See, Traynor, Mapp vs. Ohio At Large In The Fifty States, 1962 *Duke L. J.* 319 (1962). Such a minor interference with personal liberty would "touch the right of privacy only to serve it well." *Traynor, supra,* at p. 334. If such questioning failed to reveal probable cause, it would thereby forestall invalid arrests of innocent persons on inadequate cause and the attendant invasion of personal liberty and reputation. If it revealed probable cause, it would do no more than open the way to a valid arrest. The business of the police is not only to solve crimes after they occur, but to prevent them from taking place whenever it is legally possible. As stated by the New York Court of Appeals in the recent case of *People vs. Rivera, supra,* at p. 444:

> "The authority of the police to stop defendant and question him in the circumstances is perfectly clear. * * * Prompt inquiry into suspicious or unusual street action is an indispensable police power in the orderly government of large urban communities. It is a prime function of city police to be alert to things going wrong in the streets; if they were denied the right to such summary inquiry, a normal power and a necessary duty would be closed off."

Admittedly, this power to inquire may be abused. But the possibility of some future infraction should not require that the police should now be made powerless to make reasonable inquiries into suspicious behavior. If such abuses arise, we shall deal with them when the time comes. However, for the present, we hold that under the facts of this case, the detective's inquiry was reasonable under the conditions presented.

The appellant contends, however, that in the instant case, despite a right of inquiry, the arrest took place the moment the defendant was questioned by the detective. According to his argument, since the arrest took place at the time of the initial inquiry, there was at that time no adequate "reasonable grounds" to arrest and therefore under the exclusionary rule of *Mapp vs. Ohio,* 367 U. S. 643 (1961), the evidence must be suppressed. In support of this the defendant appellant's brief states: "Since the police officers in this case did not conduct any interrogation of the defendant and his companions other than an inquiry of their names * * * his purpose was to arrest and not to interrogate."

A principal cause of the difficulty here is the ambiguous nature of the word "arrest." Some courts have used the term "arrest" to signify the mere act of stopping or restraining a person. But the term "arrest" is more commonly used in the technical criminal law sense as the seizure of an alleged offender to answer for a crime. Note, 39 *N. Y. U. L. Rev.* 1093, 1096 (1964); *Commonwealth vs. Lehan,* 347 Mass. 197 (1964). The cases decided by the United States Supreme Court appear to have adopted this later usage, see *Carroll vs. United States,* 267 U. S. 132, 136 (1925); *Brinegar vs. United States,* 338 U. S. 160, 163 (1949), and it is the usage that has been adopted by the courts of Ohio. In 5 *Ohio Jurisprudence* (2d), Arrest, Sec. 3, p. 19, "arrest" is defined as follows:

> "An arrest as the term is used in criminal law signifies the apprehension or detention of the person of another in order that he may be forthcoming to answer an alleged or supposed crime."

Similarly, in *State vs. Milam,* 108 Ohio App. 254, 268 (1959), this court quoted with approval the following definition of arrest:

"To constitute an 'arrest,' four requisites are involved: A purpose to take the person into custody of the law, under real or pretended authority and an actual or constructive seizure or detention of his person, so understood by the person arrested."

It is readily apparent that a required element of an arrest is the *intent* of the officer to arrest. *United States vs. Bonanno, supra,* at 81-83. In the instant case, when the detective approached the defendant, he had, as shown by uncontradicted testimony, no intention at all to arrest, but only to inquire as to the defendant's activities. As stated in the record:

"Q. You observed these men for some ten to twelve minutes?

A. That's right.

Q. You observed the mode of conduct that you have described to us?

A. That's right.

Q. Did you, sir, as a police officer consider that you should investigate it?

A. I did.

* * *

Q. * * * after they left the corner and you observed them again in front of * * * (the store where the three men met) * * * what did you do?

A. I stopped them and went over and talked to them."

As to the exact time when the arrest took place, the record shows:

"Q. Then in this situation you considered them to be under arrest when you ordered the store people to call for the wagon?

A. That's right."

The defendant appellant, however, contends that the case of *Henry vs. United States,* 361 U. S. 98 (1959), estab-

lishes the point that the arrest in the instant case took place the moment the defendant was stopped by the detective. However, in the *Henry* case, the government conceded in the lower courts, see 259 F. (2d) 725 (7th Cir. 1958), and adhered to the concession before the Supreme Court, that the "arrest" occurred the moment the car in which Henry was riding was stopped by the federel agents. The Supreme Court in its opinion stated:

> "The prosecution conceded below, and adheres to that concession here, that the arrest took place when the federal agents stopped the car. This is our view of the facts of this particular case." 361 U. S. at 103.

When the opinion in *Henry* is read in light of this concession, it is apparent that the court was only deciding that, in the circumstances of that case, there was no probable cause to justify an "arrest" at the time the car in which Henry was riding was stopped. See, *United States vs. Bonanno, supra* at p. 85; *Busby vs. United States, supra.* Therefore, we hold that, in the instant case, the actual arrest did not occur until the defendant was ordered into the store after the loaded gun was discovered concealed on his person; Cf. *Rios vs. United States,* 364 U. S. 253 (1960).

Having determined that the police officer could validly inquire into the activities of the defendant, then it follows that the officer ought to be allowed to frisk, under some circumstances at least, to insure that the suspect does not possess a dangerous weapon which would put the safety of the officer in peril. See, Remington, The Law Relating to "On The Street" Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General, 51 *J. Crim. L., C. & P. S.* 386, 391 (1960). What is the officer to do in this situation? Are we to allow him the right of inquiry and then, when this right is exercised, reward him with an assailant's bullet? The practice of

frisking is well accepted in police practice and police officers seem unanimous in stating that frisking is done for self-protection and not as a mere evidentiary fishing expedition. See, Note, Philadelphia Police Practice and The Law of Arrest, 100 *U. Pa. L. Rev.* 1182 (1952); Leagre, The Fourth Amendment and The Law of Arrest, 54 *J. Crim. L., C. & P. S.* 393 (1963). The Uniform Arrest Act and the state statutes which provide for questioning of suspicious persons specifically allow for the frisking of a suspect. See, Warner, The Uniform Arrest Act, 28 *Va. L. Rev.* 315 (1942); Gen. Laws of R. I., Sec. 12-7-2 (1956); N. H. Rev. Stat. Ann., Ch. 594, Sec. 3 (1955); 11 Del. Code Ann., Sec. 1903 (1953); N. Y. Code Crim. Pro., Sec. 180a (1965 Supp.). In other states the right is recognized by court decision. See, *People vs. Rivera,* 14 N. Y. (2d) 441 (1964); *People vs. Martin,* 46 Cal. (2d) 106 (1956); *People vs. Simon,* 45 Cal. (2d) 645 (1955); *People vs. Jones,* 176 Cal. App. (2d) 265 (1959).

In the instant case this officer, of thirty-nine years experience, reasonably suspected that the defendant was "casing" a store with robbery in mind. It was also logical for this experienced detective to presume that the defendant was armed and dangerous. As stated in the record:

> "Q. Detective McFadden, can you tell us why you turned John Terry around facing the other two men, with you behind him?
>
> "A. Due to my observation, the observation on Huron Road of these two men, I felt as though they were going to pull a stick-up and they may have a gun."

However, we must be careful to distinguish that the frisk authorized herein includes only a frisk for a dangerous weapon. It by no means authorizes a search for contraband, evidentiary material, or anything else in the

absence of reasonable grounds to arrest. Such a search is controlled by the requirements of the fourth amendment and probable cause is essential. *White vs. United States,* 271 F. (2d) 829 (D. C. Cir. 1959). Therefore, we hold only that on the facts presented in the instant case, the frisk for dangerous weapons was valid as an incident to a valid inquiry by the police. Each case must be decided upon its own facts.

As a result of the valid frisk, a fully loaded automatic was discovered concealed on the person of the defendant. The unauthorized possession of this weapon is a felony under Section 2923.01, Revised Code. According to the uncontradicted evidence in this case, the defendant was not arrested until after he was ordered into the store. At the moment of the arrest, the detective had reasonable grounds to believe a felony was being committed. As stated in *Beck vs. Ohio,* 379 U. S. 89 (1964):

> "Whether an arrest is constitutionally valid depends upon whether, at the moment the arrest is made, the officers had probable cause to make it—whether at that moment, the facts and circumstances within their knowledge of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing the petitioners had committed or were committing an offense."

Therefore, we hold that, as the detective had validly found the gun, he had at the moment of the arrest adequate probable cause to arrest the defendant, *Busby vs. United States, supra,* and that the arrest in no way violated the fourth amendment.

One further point remains to be discussed concerning defendant appellant's contention that the arrest occurred at the time of the initial questioning and therefore under the exclusionary rule of *Mapp vs. Ohio,* 367 U. S. 643

(1961), the evidence must be suppressed. Although we had held that the arrest in this case did not take place until the defendant was ordered into the store, we must note in passing that even if the arrest took place as appellant contends, it does not necessarily follow that this evidence must be suppressed.

The *Mapp* exclusionary rule was imposed upon the states not because of some command inherent in the fourth amendment, but rather because the Supreme Court believed that it was the only way the police could be forced to respect the fourth amendment. If the police could not obtain a conviction using evidence unlawfully obtained, they would have no incentive to conduct illegal searches. If we keep in mind this raison d'etre of the exclusionary rule, we can guard against confusion in the attendant rules that are developed. A judicial rule rendering evidence produced as the result of a frisk inadmissible would fail to deter the police from frisking suspects believed to be armed as police frisk for their own protection rather than for the purpose of looking for evidence. A rule of inadmissibility in such cases could only result in allowing the armed criminal to go free although failing to any meaningful extent to protect individual liberty. The exclusionary rule of illegally obtained evidence cannot be interpreted solely to provide a tidy "fox hunting" theory of criminal justice. The purpose of the exclusionary rule is to control police misconduct and in this context it must be applied. Traynor, Mapp vs. Ohio At Large In the Fifty States, 1962 *Duke L. J.* 319 (1962); Note, 50 *Cornell L. Q.* 529 (1965).

Furthermore, even if the Supreme Court would hold that federal officers may not inquire into suspicious street activities or frisk in the absence of probable cause to arrest, this does not necessarily invalidate the applicable

state rules. There is no mandate in the Mapp opinion that the states henceforth must abide by all the interpretations of the federal courts. Traynor, Mapp vs. Ohio At Large In The Fifty States, *supra*, at 320. Local problems of law enforcement are quite different from federal problems, and the range of crimes encompassed by the states' jurisdiction creates more complicated patterns to be dealt with. The states are not precluded from developing "workable rules" governing arrest, searches and seizures to meet the practical demands of effective criminal investigation and law enforcement provided these rules do not violate the constitutional proscriptions against unreasonable searches and the concomitant command that evidence so seized is inadmissible against one who has standing to complain. *Ker vs. California*, 374 U. S. 23 (1963); *Beck vs. Ohio*, 379 U. S. 89 (1964). The necessities of law enforcement in large urban areas require the procedures utilized in the instant case. We agree with the District of Columbia Court of Appeals when they stated that they cannot believe that the "Supreme Court has forbidden the police to investigate crime." *Trilling vs. United States*, 260 F. (2d) 677, 700 (D. C. Cir. 1958).

For the reasons stated herein, the judgment of the Common Pleas Court is affirmed.

Exceptions. Order see journal

ARTL, J. and CORRIGAN, J. concur.

[Appendix C taken from Appendix C of Appellant's brief, p. 43.]

APPENDIX D.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI.

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 18, 1967/

s/ POTTER STEWART,

Associate Justice of the Supreme Court of the United States.

Dated this 12th day of January, 1967.

APPENDIX E.

STATUTE.

§ 2923.01 Carrying of Concealed Weapons.

No person shall carry a pistol, bowie knife, dirk, or other dangerous weapon concealed on or about his person. This section does not affect the right of sheriffs, regularly appointed police officers of municipal corporations, regularly elected constables, and special officers as provided by sections 311.07, 737.10, 1717.06, 1721.14, and 2917.32 of the Revised Code, to go armed when on duty. Deputy sheriffs and specially appointed police officers, except as are appointed or called into service under said sections may go armed if they first give bond to this state, to be approved by the clerk of the court of common pleas, in the sum of one thousand dollars, conditioned to save the public harmless by reason of any unlawful use of such weapons carried by them. Persons injured by such improper use may have recourse on said bond.

Whoever violates this section shall be fined not more than five hundred dollars, or imprisoned in the county jail or workhouse not less than thirty days nor more than six months, or imprisoned in the penitentiary not less than one nor more than three years.

MAY 1967
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1161.~~ 67

JOHN W. TERRY, *et al.*,
Petitioners,

vs.

STATE OF OHIO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 1161.

JOHN W. TERRY, *et al.*,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION.

There is no substantial federal question involved which would require this Court to review this case.

The questions herein presented were raised both in the Court of Appeals of Cuyahoga County, Ohio, and the Supreme Court of Ohio. The Court of Appeals affirmed in an opinion reported as *State v. Terry,* 5 Ohio App. (2d) 122; 214 N. E. (2d) 114; 34 O. O. (2d) 237. The Ohio Supreme Court refused leave to appeal.

The Ohio courts decided this case in accordance with the statutes of the State of Ohio and in accordance with the Constitution of the United States and the applicable decisions of this Court. There is therefore no substantial federal question involved.

QUESTIONS PRESENTED.

The respondent cannot subscribe to the questions presented by counsel for appellant and amicus. Their questions are taken out of context and present a distorted impression of the facts in the record. They then assume incorrect conclusions of fact and fix them in a basic premise and follow with an incorrect conclusion.

The respondent submits that the following questions are presented in this case:

I. Can the protection guaranteed to individuals by the Fourth and Fourteenth Amendments to the Constitution of the United States be said to encompass any absolute right irrespective of such restraints as the safety and welfare of the public may require?

II. Is the exercise of "stop and frisk" based on probable cause a right of society inuring to the benefit of an agent for society (the police officer) in establishing law and order and protecting the welfare and safety of society?

III. Does the decision of the Court of Appeals, Eighth Appellate District of Ohio, upholding the search and seizure, contravene the federal constitutional standards of reasonableness prescribed by the Fourth Amendment?

STATEMENT OF THE CASE.

John W. Terry and Richard D. Chilton, the petitioners, were indicted on a charge of carrying a concealed weapon, in violation of Section 2923.01 of the Revised Code of Ohio. (See petition Appendix E, page 35.) A pretrial motion to suppress the evidence was overruled, and, upon a plea of not guilty, the court, sitting without a jury, returned a verdict of guilty as to both defendants.

The relevant facts are as follows: At approximately 2:30 p.m. of October 31, 1963, a Cleveland detective with 39 years and 4 months police experience observed two men, later identified as John W. Terry and Richard D. Chilton, engaged in behavior, on the corner of East 14th Street and Euclid Avenue (in downtown Cleveland), which immediately attracted his attention and aroused his suspicions. Positioning himself across the street he observed these men for approximately ten to twelve minutes. One remained at the corner, the other walked several hundred feet up the street, peered into the window of either a diamond store or an airline office and then returned to the corner to converse with the other. In turn the other person would leave the corner, repeat these actions and return to the corner. This procedure was repeated at least two to five times by each man. During this period, a third man, later identified as Carl Katz, approached the corner, spoke briefly with the two men, departed and stationed himself across the street. The two men resumed their pattern of conduct, each making four to six trips. The two men then proceeded west on Euclid and at 1120 Euclid Avenue where they encountered the third male who was positioned there, and who had spoken with them previously. The detective testified: "* * * I didn't like their actions on Huron Road, and I suspected them of casing a job, a stick-up * * *" (R. 42).

With this belief in mind, the detective approached the three men, who were engaged in conversation, identified himself as a police officer, and asked for their names. Receiving only a mumbled, incoherent response by one or all (R. 28), the officer took hold of one (later identified as Terry), and turned him around in front of the officer facing the other two. He then patted Terry, the man in front of him. At no time did his hands reach into any pockets (R. 29-30). In patting Terry, in the upper left pocket of the top coat the officer felt a gun (R. 29). At this point the detective ordered the three men from the street to the interior of a nearby store. Retaining the appellant Terry by the collar of his coat he ordered all three to face the wall and place the palms of their hands against the wall. The detective then pulled the coat by the collar, from the rear to the shoulders of Terry, exposing in the upper left inside coat pocket a concealed revolver. The gun was removed by the detective. Subsequent examination proved it to be loaded. The officer proceeded to "pat down on the outside of his clothing" the second man, Chilton. He then felt an object in the left overcoat pocket which felt like a gun. He inserted his hand and removed a fully loaded revolver. A similar "patting down" of Katz revealed nothing. The three men were then taken to the police station where Terry and Chilton were charged with Carrying Concealed Weapons.

LAW AND ARGUMENT.

Preliminary Statement.

Through a long series of landmark decisions, lawyers and society have in the past years witnessed an affirmance of basic principles and rights in the area of criminal law. The reintroduction and affirmance of these rights into the American scene have been interpreted by many as irrevocably altering the face and character of society. The significance of these decisions and their contribution toward our legal and social progress in the intervening years is beyond question, but as with every major innovation, these decisions carry with them an inherent potential for misinterpretation, misuse and abuse on the part of some individuals and organizations, however good their intentions may be.

Realizing that the future of our Nation must rest on the shoulders of her patriotic, law-abiding citizens and on laws that protect the individual rights of those citizens, laws that protect a free society where those citizens live, and a fair and impartial administration of all those laws by the courts, and although we stand with others against those who seek to deprive or limit that patriotic law abiding citizen of any of his basic rights, as guaranteed by the Constitution and reintroduced by the many landmark decisions, it is our position that the shield of these rights should be used as such and not as a weapon by those who in zealous application (deliberately or innocently) who would misuse, misinterpret, or abuse them. We stand not only for the protection of individual rights, but also the rights of society to protection from evildoers. No right under the Constitution is so absolute or self operating that it can be permitted to conduct a bleeding operation on the very society which has given it birth and nourishment.

This is basically what is being requested by these who would have the Court overturn the decision which is the subject of review in this case.

It is argued on behalf of the petitioners that every frisking or patting down of any individual whom the police have detained for questioning is an invasion of the right to privacy guaranteed by the Fourteenth Amendment irrespective of the "unreasonable" test. It is their contention that the Fourth Amendment guarantees the absolute right of freedom from such action by law enforcement officers.

The first question posed is then:

I. Can the protection guaranteed to individuals by the Fourth and Fourteenth Amendments to the Constitution of the United States be said to encompass any absolute right irrespective of such restraints as the safety and welfare of the public may require?

The answer is found in decisions of this Court concerning the right of freedom of speech and freedom of religion.

As early as 1890 in *Davis v. Beason,* 133 U. S. 333, the Court said, "* * * with man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on these subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions re-

garded by general consent as properly the subject of punitive legislation."

The freedom of speech and of the press, which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language, and prevent the punishment of those who abuse this freedom. *Gitlam v. New York*, 268 U. S. 652, 45 Sup. Ct. Rep. 625.

"The safeguarding and fructification of free and constitutional institutions is the very basis and mainstay upon which the freedom of the press rest, and that freedom, therefore, does not and cannot be held to include the right to virtually destroy such institutions, however complete is the right of the press to state public things and discuss them, that right as every other right enjoyed in human society, is subject to the restraints which separate right from wrong doing." *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 38 Sup. Ct. Rep. 560.

The right of free speech is not an absolute one, and the state, in the exercise of its police power, may punish its abuse by those who indulge in utterances which incite to violence and crime and threaten the overthrow of organized government by unlawful means. *Strongberg v. California*, 283 U. S. 359, 51 Sup. Ct. 532.

Liberty of speech and of the press is not an absolute right, and the state may punish its abuse. *Near v. Minnesota ex rel. Olson*, 283 U. S. 697, 51 S. Ct. 625.

Thus we find from a long line of decisions that the law as it applies to question one has long been so well settled that it is unnecessary to do more than state it whenever the occasion arises.

It can therefore be assumed that the constitutional right to protection against unreasonable search and seizure is not absolute where the safety and welfare of the police officer and of the public are concerned.

II. The exercise of "stop and frisk" based on probable cause is one of those restrictive limitations permitted to the state as circumscribing the provisions of the Fourth Amendment for the protection of the safety and welfare of the people.

Such right must inure to the benefit of the people through their lawful agent, the police officer.

"'The right of freedom of speech and press * * * as every other right enjoyed in human society, is subject to the restraints which separate right from wrongdoing.' *Toledo Newspaper Co. v. United States, supra.*

The state is necessarily invested with the police power which is the expression of the popular conception of the necessities of social and economic conditions and under which may be done that which will best secure the peace, morals, health and safety of the community. *Bloomfield v. State,* 86 O. S. 253, 99 N. E. 309, 41 L. R. A. (NS) 726, Am. Cas. 1913 D, 629 (affirming the Circuit Court, which affirmed, without opinion *State v. Bloomfield,* 13 N. P. (NS) 121).

The governmental body thus is given the right to act or limit individual rights of the constitution in the area of securing peace, morals, health and safety of the community.

The Court of Appeals in rendering its opinion in the instant case has stated:

> "The right of the proper authorities to stop and question persons in suspicious circumstances has its

roots in early English practice where it was approved by the courts and the common law commentators. See, 2 Hawkins, Pleas of the Crown, 122, 129 (6th Ed. 1787): 2 Hale, Pleas of the Crown, 89, 96-97 (Amer. Ed. 1847): Lawrence vs. Hedger, 3 Taunt. 14, 128 Eng. Rep. 6 (C. P. 1810). Today, in several states, the authority of police officers to detain suspects for a reasonable time for questioning is granted by statute. E.G., N. Y. Code of Crim. Pros., Sec. 180A (1965 Supp.): Gen. Laws of R. I., Sec. 12-7-1 (1956): N. H. Rev. Stat. Ann., Ch. 594, Sec. 2 (1955): 11 Del. Ann. Code, Sec. 1902 (1953): Warner, The Uniform Arrest Act, 28 Va. L. Rev. 315 (1942): Mass. Gen. Laws, Ch. 41, Sec. 98 (1961). In others, the right is recognized by court decisions, E.g., People vs. Rivera, 14 N. Y. (2d) 441 (1964): Gisske vs. Sanders, 9 Cal. App. 13 (1908): People vs. Fagenkrantz, 21 Ill. (2d) 75 (1961).

The United States Supreme Court, however, has never squarely decided whether the police may constitutionally stop and question a suspect without his consent in the absence of adequate grounds for arrest. However, the lower federal courts permit such field interrogations. See, Henry vs. United States, 361 U. S. 98, 106 (1959) (Clark, J. dissenting): Brinegar vs. U. S., 338 U. S. 160, 178 (1949) (Burton, J. concurring): Keiningham vs. United States, 307 F. (2d) 632 (D. C. Cir. 1962), cert. den. 371 U. S. 948 (1963): Busby vs. United States, 296 F. (2d) 328 (9th Cir. 1961), cert. den. 369 U. S. 876 (1962). The cases also indicate that an officer may stop and question even though he has insufficient grounds to make an arrest. See, Ellis vs. United States, 264 F. (2d) 372 (D. C. Cir.), cert. den. 359 U. S. 998 (1959): United States vs. Bonanno, 180 F. Supp. 71, 78 (S. D. N. Y. 1960), rev'd on other grounds sub nom., U. S. vs. Buffalino, 285 F. (2d) 408 (2d Cir. 1960), cited with approval in U. S. vs. Vita, 294 F. (2d) 524, 530 (2d Cir. 1961).

Admittedly there is some division of authority on the legality of the right to stop and question; however, the better view seems to be that the stopping and questioning of suspicious persons is not prohibited by the Constitution. See, Note, 50 Cornell L. Q. 529, 533 (1965); United States vs. Vita, 294 F. (2d) 254 (2d Cir. 1961), cert. den. 369 U. S. 823 (1962). Of great persuasive authority do we consider the long line of California cases, decided under the rule of People vs. Cahan, 44 Cal. (2d) 434 (1955) in which this practice has been upheld. E.g., People vs. Martin, 46 Cal. (2d) 106 (1956); People vs. Simon, 45 Cal. (2d) 645 (1955); People vs. Jones, 176 Cal. App. (2d) 265 (1959). Also of great persuasive authority is the recent New York Court of Appeals decision in People vs. Rivera, 14 N. Y. (2d) 441 (1964) wherein this practice was also upheld. The courts of Ohio do not appear to have been squarely presented with this problem before. Therefore, we hold, in line with the great weight of authority, that a policeman may, under appropriate circumstances such as exist in this case, reasonably inquire of a person concerning his suspicious on-the-street behavior in the absence of reasonable grounds to arrest.

An individual who acts in a suspicious manner invites a preliminary inquiry by the proper authority. It does not unreasonably invade the individual's right to privacy to hold that the price of indulgence in suspicious behavior is a police inquiry. See, Traynor, Mapp vs. Ohio At Large In The Fifty States, 1962 Duke L. J. 319 (1962). Such a minor interference with personal liberty would "touch the right of privacy only to serve it well." Traynor, supra, at p. 334. If such questioning failed to reveal probable cause, it would thereby forestall invalid arrests of innocent persons on inadequate cause and the attendant invasion of personal liberty and reputation. If it revealed probable cause, it would do no more than open the way to a valid arrest. The business of the police

is not only to solve crimes after they occur, but to prevent them from taking place whenever it is legally possible. As stated by the New York Court of Appeals in the recent case of People vs. Rivera, supra, at p. 444:

> 'The authority of the police to stop defendant and question him in the circumstances is perfectly clear. * * * Prompt inquiry into suspicious or unusual street action is an indispensable police power in the orderly government of large urban communities. It is a prime function of city police to be alert to things going wrong in the streets; if they were denied the right to such summary inquiry, a normal power and a necessary duty would be closed off.'
>
> Admittedly, this power to inquire may be abused. But the possibility of some future infraction should not require that the police should now be made powerless to make reasonable inquiries into suspicious behavior. If such abuses arise, we shall deal with them when the time comes. However, for the present, we hold that under the facts of this case, the detective's inquiry was reasonable under the conditions presented."

It is well settled that there is nothing ipso facto unconstitutional in the brief detention of citizens under circumstances not justifying an arrest, for purpose of limited inquiry in the cause of routine police investigations. *Rios v. United States*, 364 U. S. 253, 80 S. Ct. 1431, 4 L. Ed. 2d 1688 (1960); *Busby v. United States*, 296 F. 2d 328 (9th Cir. 1961).

The local policeman, in addition to having a duty to enforce the criminal laws of his jurisdiction, is also in a very real sense a guardian of the public peace and he has a duty in the course of his work to be alert for suspicious circumstances, and provided that he acts within consti-

tutional limits, to investigate whenever such circumstances indicate to him that he should do so. *Frye v. U. S.*, 315 F. 2d 491 at 494 (9th Cir. 1963).

While the constitutional prohibition against unreasonable searches and seizures makes no distinction between informal detention without cause and formal arrest without cause, there is a difference between that cause which will justify informal detention short of arrest and the probable cause required to justify that kind of custody traditionally denominated an arrest. *Wilson vs. Porter*, 361 F. 2d 412.

Due regard for the practical necessities of effective law enforcement requires that the validity of brief, informal detention be recognized whenever it appears from totality of circumstances that the detaining officers could have had reasonable grounds for their action, and a founded suspicion is all that is necessary, that is, some basis from which the court can determine that detention was not arbitrary or harassing. *Wilson v. Porter, supra.*

When the detention of defendant by police, initially for purpose of investigating his identity, became an arrest was to be determined under state law subject to such minimum constitutional standards as the United States Supreme Court had prescribed. *Wilson v. Porter, supra.*

Here upon the discovery of the revolver the police were confronted with a felony. (Ohio Revised Code 2923.-01.) For this there was probable cause to arrest. *Commonwealth v. Ballow, Jr.*, 217 N. E. 2d 187 (1966). *Commonwealth v. Phelps*, 209 Mass. 396, 404, 95 N. E. 868. *Commonwealth v. Holmes*, 344 Mass. 524, 525, 183 N. E. 2d 279; *People v. Mickelson*, 59 Cal. 2d 448, 450, 451, 30 Cal. Rptr. 18, 380 P. 2d 658 and cases cited. *People v. Rivera*, 14 N. Y. 2d 441, 447, 252 N. Y. S. 2d 458, 201 N. E. 2d

32, cert. den. sub nom. *Rivera, v. N. Y.*, 379 U. S. 978, 85 S. Ct. 679, 13 L. ed. 2d 568.

The test to be applied in determining whether search and seizure is unreasonable is whether the thing done, in sum of its form, scope, nature, incidents and effect, impresses as being fundamentally unfair or unreasonable in the specific situation when the immediate end sought is considered against the private right affected. *State v. Hagan,* 137 N. W. 2d 895. *United States v. Haskins,* D. C. E. D. Tenn. 1962, 213 F. Supp. 551; *United States v. Cook,* D. C. E. D. Tenn. 1962, 213 F. Supp. 568; *Schwimmer v. U. S.,* C. A. 8th (1956), 232 F. 2d 855, cert. den. 352 U. S. 833, 77 S. Ct. 48, 1 L. Ed. 2nd 52.

Presence of automobiles near scene of crimes under suspicious circumstances, however slight, imposes upon police the duty to stop and question the occupants, inspect or search them, and remove incriminating evidence found therein. To hold otherwise would make a farce of the police protection to which all citizens are entitled. *State ex rel. Ogg v. Iahash,* 140 N. W. 2d 692.

In *State v. Herdman,* 130 N. W. 2d 628, the Supreme Court of Minnesota uses the following language.

> "In the argument before this court it appears to be the claim of the defendant that the evidence used against him was the product of an exploratory search without probable cause in violation of his rights under the 4th and 14th Amendments. It seems to be further urged that since Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. ed. 2d 1081, police officers are not permitted to accost a suspicious character on a public street for questioning. While the Mapp case and numerous decisions recently handed down by the United States Supreme Court clearly establish that under state and federal procedure citizens are entitled to uniform protection from unreasonable

searches and seizures, we do not understand that these decisions have gone so far as to require or suggest that state police officers follow precise procedures in making arrests, searches and seizures. The Fourth Amendment protects the individual only from 'unreasonable' searches and seizures; and whether a search and seizure is 'unreasonable' must depend upon the particular facts of each case.

"Nor do we feel that the legality of the arrest of defendant is tainted because the police officers accosted and interviewed defendant without actual information that he was carrying stolen property in his automobile. Under the circumstances here, the police officers did no more than what they were required to do in performance of their duties. * * *

"Persons found under suspicious circumstances are not clothed with a right of privacy which prevents police officers from inquiring as to their identity and actions. The essential needs of public safety permit police officers to use the faculties of observation and to act thereon within proper limits."

To justify the seizure of a weapon which could be used against the arresting officer we shall not draw a fine line measuring the possible risk to the officer's safety. The officer should be permitted to take every reasonable precaution to safeguard his life in the process of making the arrest. *State vs. Riley,* 402 P. 2d 741 (1965).

Circumstances short of probable cause to make an arrest may still justify officers stopping pedestrians or motorists on streets for questioning, and if circumstances warrant, officer may, in self-protection, superficially search suspect for concealed weapons, and should investigation then reveal probable cause to make an arrest, officer may arrest suspect and conduct reasonable search incidental thereto. *People v. Machel,* 44 Cal. Rpts. 126 (1965).

While rule permitting temporary detention for questioning is operative under circumstances short of probable cause to make an arrest, there must exist some suspicious or unusual circumstance to authorize even this limited invasion of citizen's privacy. *People v. Machel, supra.*

Reasonable investigatory techniques may be pursued by police indoors as well as outdoors, and it is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purpose. *People v. Machel, supra.*

Generally police officers may detain and question persons when circumstances are such as would indicate to reasonable man in a like position that such course is necessary to proper discharge of duty. *People v. Machel, supra.*

Reasonable search without warrant is valid where it is incidental to lawful arrest, and a seizure during such a search of evidence used in commission of crime for which arrest is made is permissible. *People v. Machel, supra.*

"Reasonable Cause" had been generally defined to be such state of facts as would lead man of ordinary care and prudence to believe and consciously entertain an honest and strong suspicion that person is guilty of crime. *People v. Machel, supra.*

Question of probable cause to justify defendant's arrest and search must be tested on facts which records show were known to officers at time arrest was made. *Supra.* Also *People v. Hernandez*, 40 Cal. Repts. 100.

"The right of police to investigate gives rise to right to conduct reasonable search for weapons in order to protect safety of officer." *People v. Garrett*, 47 Cal. Rpts. 731 (1966).

The rule that circumstances short of probable cause to make an arrest may still justify an officer stopping pedestrians or motorists on the street for questioning does not

conflict with United States Constitution, Fourth Amendment forbidding unreasonable searches and seizures, but strikes a balance between a person's interest in immunity from police interference and the community's interest in law enforcement, and wards off pressure to equate reasonable cause to investigate with reasonable cause to arrest, thus protecting the innocent from the risk of arrest when no more than reasonable investigation is justified. *People v. Mickelson*, 59 Cal. Rpts. 2d 448 (1963).

If we recognize the authority of the police to stop an individual and inquire concerning unusual street events (*U. S. v. Vita*, 294 F. 2d 524, 530: *People v. Marendi*, 213 N. Y. 600, 609; in a similar direction, *U. S. v. Bonamo*, 180 F. Supp. 71, 81, 83, which although reversed on other grounds sub nom. *U. S. v. Bufalino*, 285 F. 2d 410, was cited on this point with approval in *Vita* at page 530), we are required to recognize the hazards involved in this kind of public duty. The answer to the question propounded by the policeman may be a bullet; in any case the exposure to danger and the safety and welfare of the officer (the public's interest) could be very great. The frisk for weapons is a reasonable and constitutionally permissible precaution to minimize that danger in the interest of safety and welfare.

We ought not, in deciding what is reasonable, close our eyes to the actualities of street dangers encountered in performing this kind of public duty.

We submit, therefore, that the "stop and frisk" (for weapons) based on probable cause is constitutionally permissible as inuring to the benefit of an agent for society (the policeman) in establishing law and order and protecting the interest (safety and welfare) of society.

III. The decision of the Eighth District Court of Appeals, which the petitioner is seeking to have this Court overturn, does not contravene federal constitutional standards of reasonableness prescribed by the Fourth Amendment.

The search most commonly made by law enforcement officers and the subject of the petitioners' complaint herein is that of the person of the accused whom the officer had arrested. Searches of the person, if made, must conform to federal constitutional standards. The Fourth Amendment provides, in part, that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *."

A person may be searched by a search warrant, although this method is seldom used. The vast majority of searches of the person are made incidental to lawful arrests. It is the law on this question of search with which we will deal.

The English and American law has always recognized the right on the part of the government to search the person of the accused when legally arrested. *Weeks v. U. S.*, 232 U. S. 383, 392 (1914); *Abel v. U. S.*, 362 U. S. 217 (1960).

> "The law on this subject has long been so well settled that it is useless to do more than state it whenever the occasion arises." *Lefkowitz v. U. S. Attorney*, 52 F. 2d 52 (1931), aff. 285 U. S. 452.

The right to search applies to arrests for misdemeanors as well as to those for felonies, *U. S. v. Snyder*, 278 F. 650 (1922); *Davis v. U. S.*, 328 U. S. 582 (1946) assuming an arrest in the full sense of the term.

The legal basis of the right to search is given by law to the arresting officer for three reasons:

1. to protect the officer against harm;
2. to deprive the prisoner of potential means of escape; and
3. to prevent destruction of evidence by the arrested person.

Mr. Justice Frankfurter, dissenting in *U. S. v. Rabinowitz*, 339 U. S. 56 (1950); *Abel v. U. S., supra* at 236.

If the arrest of the person is unlawful, any subsequent search made incidental to arrest is unreasonable. *U. S. v. DiRe*, 332 U. S. 581 (1948); *Brandon v. U. S.*, 270 F. 2d 311 (1959), Note 5, cert. den. 362 U. S. 943; *Bynus v. U. S.*, 262 U. S. 465; *Williams v. U. S.*, 237 F. 2d 789 (1956).

No matter how valid the arrest may be in a technical sense, if the court finds that it was used by the officers simply as a pretext to make a search of the person, the search is unreasonable. *Taglavore v. U. S.*, 291 F. 2d 262 (1961). "An arrest may not be used as a pretext to search for evidence." *U. S. v. Lefkowitz*, 285 U. S. 452 (1932).

The search of the person, incidental to arrest should be made by one or more of the arresting officers. *U. S. v. Grieco*, 25 F. R. D. 58 (1960).

The officer's right to make a search of the person incidental to arrest being predicated upon the arrest, the search must follow the arrest, not precede it. *White v. U. S.*, 271 F. 2d 829 (1959); *U. S. v. Hamn*, 163 F. Supp. 4 (1958).

At this point the distinction made by the trial court and the appellate court comes into this case. It is submitted that the foregoing rule in the *White* and *Hamn* cases and the decision in the *Mapp* case *will not* outlaw

a state officer's frisking or even a search of the person made prior to arrest. Under the Uniform Arrest Act, adopted with modifications in Delaware, New Hampshire and Rhode Island, "a peace officer may search for a dangerous weapon any person whom he has stopped or detained to question as provided in Section 2, whenever he has reasonable ground to believe that he is in danger if the person possesses a dangerous weapon. If the officer finds a weapon, he may take and keep it until the completion of the questioning, when he shall either return it or arrest the person." *The Uniform Arrest Act,* 28 Virginia Law Review 315 at 344 (1942).

The petitioners argue, of course, that a frisking is a search in the full meaning of that term. The frisk as it is described in the actual events that occurred in this case, however, and as it is generally understood in police usage, is a contact or patting of the outer clothing of a person to detect by the sense of touch if a concealed weapon is being carried. The frisk is less such an invasion of the person in degree than an initial full search of the person would be. It ought to be distinguishable also on pragmatic grounds from the degree of constitutional protection that would surround a full-blown search of the person.

This is exactly the distinction the trial judge made:

> "The constitutional restriction is against unreasonable searches; not against all searches. And what is reasonable always involves a balancing of interest: here the security of the public order and the lives of the police are to be weighed against a minor inconvenience and petty indignity. A similar police procedure has long been sustained in California." *People v. Martin,* 46 Cal. 2d 106 (1956).

As the Court of Appeals noted, a State is not precluded from developing workable rules governing searches to

meet the practical demands of effective criminal investigations on law enforcement if the state does not violate the constitutional standard of what is reasonable. *Ker v. Calif.*, 374 U. S. 23, 34, 31 LW 4611.

It is therefore urged that the issue raised by the petition for certiorari has been effectively disposed of in the decisions of the Ohio courts sustaining the legal authority of a police officer to stop and question persons upon some probable cause and, if need be, to frisk for weapons to insure the protection of the officer and the safety and welfare of the community.

It is argued by the petitioners that the trial court made a finding that the arrest was unlawful and that after making such a finding of illegal arrest the court should have suppressed the evidence. We cannot agree with this. The trial court never held that these men were illegally arrested in this case. The court merely said that had the arrests preceded the frisking of the men, such arrests would then have been illegal. The court then delineated the distinction between "frisking" as commonly practiced by police officers when they stop a suspect and the search of the person incident to arrest.

If we accept the law of "stop and frisk" as a benefit to society in the interest of safety and welfare, the subsequent factual situation must be looked into in the light of that law to establish whether we have a legal arrest and a search incident thereto.

There appears to be no question but that the trial judge, defense counsel and the prosecuting attorney all agree that up to the point the petitioners were frisked by the detective probable cause for an arrest did not exist. Petitioners contend that the arrest occurred when the men were stopped notwithstanding the decision of the Court of Appeals that the stopping did not constitute an arrest.

What, then, was in the mind of the officer after he had observed the activities of the petitioners which led him to conclude that they were "casing a place for a stick-up"? From the testimony it can only be concluded that the officer approached the three men solely for the purpose of routine interrogation and had no intention of detaining them beyond the momentary requirements of that mission. Upon identifying himself as a police officer and asking them their names and their responding by muttering something incomprehensible, coupled with his conclusions made from his prior observations ("they were casing a job, a stick-up"), the officer was confronted with only one course of action to a good police officer. Frisk for weapons for protection of his own life. "I wanted to see if they had any guns." (R. 137.) To this point in our facts there is no basis for an arrest. Had the officer frisked and found nothing there would have been no grounds for an arrest.

The officer while frisking, through his sense of touch felt a bulge in the upper left breast pocket which he decided was a gun. We must at this point recall that here is an officer with thirty-nine years experience and training, who has had countless opportunities to recognize the presence of weapons concealed under a suspect's clothing. Applying this to the observations of these men which he had made previously, the only intelligent conclusion that a trained police officer could make was that the defendant was at that time committing a felony in the presence of the officer by carrying a concealed weapon. To this point there has been no arrest, no search. Arrest followed immediately thereafter when the men were ordered to move inside the store and place their hands against the wall. Where there was no previous intent to detain, there is now; where there was no previous probable cause to arrest, there is now. The defendants are not free

to go at liberty. They were under arrest. Even though technical words of "you are under arrest" were not spoken, a valid arrest had been made.

Arrest is to deprive a person of his liberty by legal authority. The seizing of a person and detaining him in the custody of the law. R. C. Section 2935.01, *Bouvier's Law Dictionary,* Baldwin's Revision.

An arrest in criminal law signifies the apprehension or detention of the person of another in order that he may be forthcoming to answer an alleged or supposed crime. 5 *O. Jur.* 2d, Arrest Sec. 3.

Arrest is the taking, seizing, or detaining of the person of another, either by touching or putting hands on him, or by any act which indicates an intention to take him into custody and subject the person to the actual control and will of the person making the arrest. 5 *O. Jur.* 20, Arrest Sec. 2, 57 *O. Jur.* 2d Words & Phrases 70.

It was not until after the act of arresting these men that an actual search of their persons was made.

Thus, here we have a lawful arrest after, not before, the frisk. The search of the person incidental to said arrest is therefore lawful. *Weeks v. U. S., supra; Abel v. U. S., supra; Lefkowitz v. U. S. Attorney, supra.*

In discussing all the facts and law pertaining to this case, in addition to the state's position being sustained by the law there is sound public policy reasons which dictate that the Court of Appeals' ruling should be upheld. As was indicated in the *Rivera* case, *supra,* "The business of the police is to prevent crime if they can. Prompt inquiry into suspicious or unusual street action is an indispensable police power in the orderly government of large urban communities. * * * if they were to be denied the right of such summary inquiry, a normal power and a necessary duty would be closed off."

A consideration of the law, public policy, and the interest of the community compels the conclusion that the conduct of the police was not violative of the federal constitutional standards of reasonableness prescribed by the Fourth Amendment and that the decision of the Court of Appeals upholding such conduct properly applied such constitutional standards.

Since there is no justiciable issue that has not been decided in accordance with applicable law, we respectfully submit that the petition for a writ of certiorari be denied.

Respectfully submitted,

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SUPREME COURT, U. S.

OCT 16 1967

JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 67

JOHN W. TERRY, ET AL.,

Petitioners,

—v.—

STATE OF OHIO,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR PETITIONER, TERRY

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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967

No. 67

JOHN W. TERRY, ET AL.,

Petitioners,

—v.—

STATE OF OHIO,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR PETITIONER, TERRY

Opinions Below

The opinion of the trial court, that is, the Court of Common Pleas of Cuyahoga County, is officially reported as *State* v. *Chilton, et al.*, 95 Abs. 321 (September 22, 1964). This opinion is printed herein in Appendix A, *infra,* page 27.

The opinion of the Court of Appeals for Cuyahoga County, Ohio, which affirmed the convictions of the petitioners by the trial court, is officially reported as *State* v. *Terry,* 5 Ohio App. (2d) 132; 214 N. E. (2d) 114; 34 O. O. (2d) 237 (February 10, 1966), and is printed herein as Appendix B, *infra,* page 31.

The Supreme Court of Ohio did not render any formal opinion in dismissing the petitioners' appeals, *sua sponte,* on the ground that no substantial constitutional question was involved.

Jurisdiction

The judgment of the Supreme Court of Ohio was entered on the 19th day of October, 1966. Time for filing a petition for certiorari was extended by this Court from January 17, 1967 to March 18, 1967. (Appendix C, *infra,* page 43.) The petition was filed March 17, 1967, and granted May 2, 1967. —— U.S. —— (1967). The jurisdiction of this Court rests upon 28 U.S.C. Section 1257 (3).

Questions Presented

I.

Where the trial court makes a finding that the arrest of the petitioners was unlawful, does the introduction of evidence against the petitioners, which was obtained as a result of the illegal arrests, violate the Fourth and Fourteenth Amendments to the United States Constitution.

II.

Where evidence has been seized from the person of the petitioners as the product of an illegal search and seizure, whether the refusal of the court to apply search and seizure law, and the substitution therefor of a stop and frisk doctrine, is a violation of the Fourth and the Fourteenth Amendments to the United States Constitution.

III.

Where no emergency exists, and in the absence of probable cause, can a police officer acting upon bare suspicion alone stop, frisk, and search petitioners for a gun on the street, and can the Court of Appeals justify such conduct by substituting a standard of "reasonably suspects" for the "probable cause" set forth in the Fourth Amendment to the United States Constitution.

Constitutional Provisions Involved

The pertinent portions of the United States Constitution are set out below:

Amendment IV.

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment XIV.

> "* * * Nor shall any state deprive any person of life, liberty or property without due process of law * * *."

Statute Involved

Ohio Revised Code Section 2923.01 is set out herein as Appendix D, *infra,* page 44.

Statement of the Case

Petitioners herein were indicted, tried, convicted and sentenced to the Ohio State Penitentiary for the offense of Carrying a Concealed Weapon.

Prior to the trial, the Court conducted a hearing on petitioners' pre-trial motions to suppress the evidence, to-wit: guns. The entire testimony on the motions to suppress consisted of the testimony of one police officer. The State's entire case also consisted of the testimony of this one police officer. The Court overruled petitioners' motions to suppress (R. 94, *et seq.*) and upon trial permitted into evidence, the guns, shells, and the testimony of the police officer relating to custodial conversation with the petitioner, Richard Chilton, in the jail house.

The police officer called to testify on both the motions to suppress and the trial testified that his name was Martin McFadden; that he had been a police office for 39 years and four months; and that he had been assigned to the Detective Bureau for 35 years.

He further testified that on the 31st day of October, 1963, he first observed one John Terry and one Richard Chilton standing at the corner of Huron Road and Euclid Avenue where these two streets intersect at East 13th Street in the City of Cleveland. That it was 2:00 or 2:30 p.m., and that it was broad daylight. After observing these two colored males standing at the corner talking, he positioned himself in the lobby of Rogoff's store, near 14th Street on Huron Road, for the purpose of further observation. During a period of some 10-12 minutes, he observed that one male would stand at the corner while the other one would walk up Huron Road. That this male would stop and look

into either Diamond Store or the United Airlines Office for a second or so and then continue west on Huron Road near Halle Brothers Store. He would then turn around, come back to the spot where the stores were, peer in the window, and go back to the corner where he would talk with the waiting male. Then the man who had been waiting would go through this same procedure. The testimony with reference to the number of trips each man made varied from two to three times each to four to five time apiece. (R. 14, 22, 24.)

During this 10 to 12 minute period of observation, the officer stated that he saw a short, white man come over to the corner, converse with these two colored males for a minute or so, and then walk west on Euclid.

He then observed the two colored males walk west on Euclid Avenue in a natural manner, and at Zucker's store, 1120 Euclid Avenue, he saw them stop in front of this store and again converse with the same white male.

The officer further testified that these three men were just standing in front of the store with their backs to the display window; that they were just talking; and that he approached them and stated that he was a police officer. He said that he asked them their names and that "they gave it to me quick." (R. 17) (At all other places in the records he says "they mumbled something.") Then without any further conversation between the officer and these men, and no overt act on the part of the men, the police officer conducted himself as follows:

> "A. • • • I got Chilton then, not Chilton but Terry and I turned him around and I stood in the back of them, and I searched them, and in his upper left hand pocket of his topcoat I felt a gun and I went in for it

and I had a tough time getting it, so I took the coat off. I at that time informed them, the three of them, to keep their hands out of their pockets and walk into the store. When they got into the store I told them to face the wall, keep their hands away, and on searching Chilton in his left hand pocket of his topcoat I found a gun, a '38, and searching Katz I found nothing." (R. 16, 17)

The three men were then taken to the Cleveland Police Station where they were booked for "Investigation." A day or so later, Terry and Chilton were charged with "Carrying a Concealed Weapon," a felony, and Katz was charged with "Being a Suspicious Person," a misdemeanor.

The officer admitted that there were people on the street when this matter occurred and that the stores were open and that there was business as usual in the downtown area. He admitted that he did not know any of these men (R. 44, 119); that no one had furnished him any information regarding them (R. 43, 44, 119); and that his reason for watching them was that "they didn't look right to me at the time." (R. 119) With reference to his reason for approaching the men in front of Zucker's and turning Terry around and patting him down, the officer testified as follows: "In the first place I didn't like their actions on Huron Road, and I suspected them of casing a job, a stickup. That's the reason." (R. 42) He said that he patted them down " • • • to see what they had, if they had guns." (R. 42) However, he testified under inquiry by the Court that in 39 years as a police officer and 35 years as a detective, that he had no experience in observing individuals casing a place and had never observed anybody casing a place. (R. 46)

ARGUMENT

I.

Where an Arrest Is Unlawful, Evidence Seized as a Result Thereof and Used at the Trial Violates the Fourth and Fourteenth Amendments.

The trial court in its opinion (R. 96) stated:

> There is no evidence that any warrant had been issued for a search or frisk and I am not going to stretch the facts and say that there was a lawful arrest prior to the frisk of the defendants. I believe it would be stretching the facts beyond reasonable comprehension and foolhardy to say there was a lawful arrest, because there wasn't, from the facts as presented . . .

And then reiterated this position later in this same opinion (R. 100):

> I believe and I reiterate again that search and seizure law cannot be applied in this particular case, although Mr. Reuben Payne endeavored to show there was a lawful arrest, but the Court cannot agree. If there was an arrest it came subsequent to the frisk . . .

In setting forth its opinion regarding the question of arrest, the Court was aware of the police officer's testimony which clearly demonstrated a lack of probable cause for arrest at the time that he stopped and searched the petitioners. The clear absence of probable cause is best illustrated by the following examination of the police officer (R. 43, 44, 45):

Q. Mr. McFadden, you just said you suspected them of casing a job, is that correct? A. That's right.

Q. You were basing this— A. Pardon?

Q. You were basing this, suspecting them of casing a job, upon your observations of them, sir? A. That's right.

Q. Had anyone come up to you and given you any information regarding these two men? A. Absolutely no.

Q. Did you know these two men previously, sir? A. I do not, I didn't know the men from Adam.

Q. This would include the white fellow, Officer? A. I did not know the white man either. I never seen the three men before.

* * * * *

Q. But when you walked up to these men and you first spoke to them you did not know that these men had guns on them, did you? A. Absolutely not.

At the moment that the police officer approached the petitioners and the third man, it is apparent that he did not have probable cause to arrest. Yet after perfunctorily saying to them that he was a police officer he then relates the illegality of his actions as follows (R. 16, 17, 18):

Q. You were speaking to the three of them? A. All three of them.

Q. Will you tell us exactly what you said to them, Detective McFadden? A. I said I was a police officer. I asked each one their name, and they gave it to me quick. I got Chilton then, not Chilton but Terry, and I turned him around and I stood in the back of them, and I searched them, and in his upper left-hand pocket

of his topcoat I felt a gun and I went in for it and I had a tough time getting it, so I took the coat off.

I at that time informed them, the three of them, to keep their hands out of their pockets and walk into the store.

When they got into the store I told them to face the wall, keep their hands away, and on searching Chilton in his left-hand pocket of his topcoat I found a gun, a '38, and seaching Katz I found nothing.

* * * * *

Q. Now, taking you back for a moment to the point where you said you were a police officer and you asked their names, did each of them give you their names? A. They said something.

Q. Was this the point at which time you grabbed Terry and spun him around as you described? A. That's right.

Q. Now, had you said, other than saying to them, "What are your names?" Did you say anything else at all to them before you spun Terry around? A. No, I didn't, but I will say this—

* * * * *

Q. Now, this gun that you found on Terry was located where? A. In his upper left-hand topcoat pocket.

Q. It was not visible to you just looking at him, was it? A. No.

In light of the foregoing, and it being apparent that there was no probable cause for arrest prior to the search, the Court was correct in making its finding that the arrest in this case was not legal. Since, as the Court said, "if

there was an arrest it came subsequent to the frisk," the illegal search and seizure which yielded the gun cannot provide the probable cause which was absent at the time of the stop, the frisk, and the search. Therefore, based upon its findings, it was incumbent upon the Court to suppress the evidence which was the product of an illegal search and seizure and the failure of the Court to suppress was violative of the Fourth and Fourteenth Amendments. *Mapp* v. *Ohio,* 367 U.S. 643 (1961).

Permitting the police to stop and frisk and thereby acquire probable cause would no doubt subject some guilty persons to the arms of the law. In the main, however, it would leave the large majority of decent citizens subject to the whim and caprice of police officers and on the street, "stops", "pats", "frisks", and "searches".[1] Resultantly, the police might not acquire probable cause, but the citizen would most assuredly surrender freedom and dignity without any redress for the temporary arrest and indignity which yielded no illegal product and no probable cause.

The trial Court here ruled that there is a distinction between stopping and frisking and search and seizure. (R. 98). As a basis for such a distinction the Court cited *Ker* v. *California,* 374 U.S. 23 (1963) as being authority for the States being able to establish their own rules and standards pertaining to search and seizure so long as those rules and standards do not violate the substance and spirit of the Fourth Amendment.

It is impossible to square this distinction by the trial Court with *Ker* in light of the court's reliance upon a term

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[1] 52 Northwestern University Law Review 16, by Caleb Foote (1957): Law and Police Practices: Safeguards in the Law of Arrest.

known as "reasonable cause",[2] not heretofore known to be either part substance or spirit of the Fourth Amendment. After stating that the police officer had "reasonable cause" to approach them and pat them the court then said (R. 98):

> Had he gone into their pockets and obtained evidence, an an example, narcotics or illegal slips, there would be no question of an illegal search and seizure . . .

The establishment of such a distinction, without a difference, and the refusal of the Court to apply search and seizure law as set forth in *Mapp* v. *Ohio, supra,* and *Beck* v. *Ohio,* 379 U.S. 89 (1964) is clearly violative of the Fourth Amendment.

The pronouncement in *Ker* permitting the States to develop workable rules does not authorize them to establish standards below the minimal ones required by the Fourth Amendment. And, if the trial Court would have applied search and seizure law to contraband found on the petitioners, he cannot deny them the Fourth Amendment protections merely because guns were found as a result of a search, termed a "frisk".

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[2] "Book Review," by Yale Kamisar, 76 Harvard Law Review 1502 of Report and Recommendations of the Commissioners' Committee on Police Arrests for Investigation, by Robert V. Murray wherein Kamisar cites the following at page 1505:

> . . . the Fourth Amendment prohibits 'seizures' without probable cause. No matter how frequently or deceptively the word 'reasonable' is utilized in formulating a standard for detentions or arrests for investigation—'reasonable circumstances,' 'reasonable suspicion,' 'reasonable grounds to suspect'—any standard less than 'probable cause' is 'unreasonable' in the constitutional sense.

Note: Kamisar's comment at page 1511:

> I submit that many of the Uniform Arrest Act Provisions were fatally defective as early as Wolf v. Colorado. . . .

Generically speaking, whether the police officer "frisks", "taps", "pats", or "searches", the result is a search,[3] and a search incident to an unlawful arrest is constitutionally prohibited. There is no distinction where there is no probable cause. If one "taps", "pats", or "frisks", for narcotics or policy slips, and the finding of them is an illegal search, then also if one "taps", "pats", or "frisks", for a gun, and finds it, it is still an illegal search.

Rather than providing the Trial Court with a basis for distinction, *Ker* (at pp. 34-35), in fact sustains the petitioners entitlement to suppression. In its contortive effort to sustain the frisk and illegal search without probable cause, the court failed to adhere to the portion of *Ker* which was applicable to this situation, which is:

> The evidence at issue, in order to be admissible, must be the product of a search incident to a lawful arrest, since the officers had no search warrant. The lawfulness of the search without warrant, in turn, must be based upon probable cause, which exists "where 'the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Brinegar* v. *United States,* 338 U.S. 160, 175-176 (1949), quoting

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[3] Webster's Third New International Dictionary, Volume I (1961): "frisk . . . 2a: to search or go through esp. for concealed weapons or stolen articles . . . esp. to search (a person) for such purpose usually by running the hand rapidly over the clothing and through the pockets . . ."

Also see Webster's Collegiate Dictionary, Fifth Edition (1948): "Frisk . . . 2. Slang. to search (a person) by running the hand over the clothing, through pockets, etc.; hence, to steal from in such a manner."

from *Carroll* v. *United States,* 276 U.S. 132, 162 (1925); accord, *People* v. *Fischer,* 49 Cal. 2d 442, 317 P. 2d 967 *Bompensiero* v. *Superior Court,* 44 Cal. 2d 178, 281 P. 2d 250 (1955).

II.

The Substitution of a Judicial "Stop and Frisk" Doctrine for "Probable Cause" Violates the Fourth and Fourteenth Amendments.

The lawfulness of the arrest in this case must be tested by the Fourth Amendment, and since the arrest was without a warrant, it must be based upon probable cause. *Wong Sun* v. *United States,* 371 U.S. 471 (1963); *Henry* v. *United States,* 361 U.S. 98 (1959).

Probable cause cannot be retroactively supplied by the evidence uncovered. *Rios* v. *United States,* 364 U.S. 253 (1960); *Henry* v. *United States,* 361 U.S. 98 (1959); *Johnson* v. *United States,* 333 U.S. 10 (1948); *City of Lakewood* v. *Smith,* 1 Ohio State, 2d 128 (1965).

The Ohio Court of Appeals justified their substitution of a "stop and frisk" doctrine for "probable cause" on the rationale that a police officer of thirty-nine years experiance "reasonably suspected" that the defendant was "casing" a store with robbery in mind. The Court then said: "It was also logical for this experienced detective to presume that the defendant was armed and dangerous."

Yet we find such rationale to be contra to the actual facts in the case. This is demonstrated vividly in the following colloquy between the police officer and the Court (R. 46, 47):

By the Court:

Q. You have mentioned about casing a place. In ordinary language what do you mean by casing? A. I mean waiting for an opportunity.

Q. Of doing what? A. Of sticking the place up.

Q. In your thirty-nine years of experience as an officer, and I believe you testified thirty-five years as a detective—is that correct? A. That's correct.

Q. Have you ever had any experience in observing the activities of individuals in casing a place? A. To be truthful with you, no.

Q. You never observed anybody casing a place? A. No.

* * * * *

Q. What caused you specifically to be attracted to those two individuals at the location that you have mentioned, or let me put it to you this way:

Supposing those two defendants here that are now in Court were standing across the street from here, and doing the same activities that you observed them on Huron and Euclid, would you have had any cause for suspicion? A. I really don't know.

And this further testimony (R. 160):

Q. During your tenure as a police officer, during your 39 years as a police officer, how many men have you had occasion to arrest when you had observed them and felt as though they might pull a stick-up? A. To my recollection, I wouldn't know, I don't know if I had—I don't remember of any.

* * * * *

Q. You don't remember of any, is that the last part? A. That's true.

Then this same Court of Appeals further justified their ruling on the theory that the stopping and questioning of suspicious persons is not prohibited by the Constitution. (Appendix B, page 41) The court then proceeded to hold as follows:

> "Therefore, we hold, in line with the great weight of authority, that a policeman may under appropriate circumstances such as exist in this case, reasonably inquire of a person concerning his suspicious on-the-street behavior in the absence of reasonable grounds to arrest. . . . "

Such a holding was made by the Court in spite of a record which patently obviates any intention on the part of the police officer to inquire. The record completely negatives any such intention. Other than announcing to these men that he was a police officer and posing the singular question to them "What are your names," it is uncontroverted that no further questions were asked of any of the three men until the following day at the jail. See (R. 19, 20):

> "Q. Now, did you at that point say anything further to these three men? A. Not at that time, no.
>
> * * * * *
>
> Q. Between the time you removed this gun from Chilton, and the arrival of the other members of the police department, did you have occasion to say anything further to either Chilton or Terry. A. Not that I remember, no."

Even suspicious conduct alone does not subject a person to loss of his immunity from search of his person and exempt him from inclusion in the Fourth Amendment. *U. S.* v. *DiRe,* 332 U.S. 481 (1948); *People* v. *Ford,* 356 Ill. 572, 191 N.E. 315 (1934); *People* v. *Macklin,* 353 Ill. 64, 186 N.E. 531 (1933).

In considering whether the officer had probable cause for arrest in accordance with law, these excerpts from his testimony are of prime importance:

1. When asked at what point he considered their actions unusual, his reply was (R. 118):

> "Well, to be truthful with you, I didn't like them. I was just attracted to them, and I surmised that there was something going on when one of them left the other one and did the walking up, walk up past the store and stopped and looked in and came back again."

2. At R. 119:

> "Q. You didn't know either one of these men did you? A. I did not.
>
> Q. And no one had furnished you any information with regard to these two men, have they? A. Absolutely no information regarding these two men at all. I am telling the truth when I say that."

3. At R. 121:

> "Q. Now when you saw this white man come over and and talk to the two of them, there at the corner of Huron and 14th, did you know this white man? A. No, I didn't.

Q. You had no information with reference to this white man? A. No information on anything that I—on anything that I seen, anything that I seen I had no information whatsoever on."

4. At R. 129-134:

"Q. Well, you tell the court as you walked through the door you said 'Order the wagon' and as you further say you were then arresting Chilton, Terry and Katz—A. That's right.

* * * * *

Q. What were Chilton and Katz being arrested for? A. Association.

Q. Is that your complete answer, sir? A. Well, they were found in company with a man with a revolver.

Q. So then at that point they were being arrested for Association? A. They were being arrested, yes, period.

Q. Do you know of any charge under Ohio Law entitled 'Association'?

* * * * *

A. As far as I know, I don't know."

In view of the above it is apparent that the inquiry which the officer intended was physical and not verbal, and that he had substituted "a hunch" for probable cause. His obvious intention then was to search in order to acquire probable cause. However, the after-the-event justification does not create probable cause. An arrest without a warrant by-passes the safeguards provided by an objective predetermination of probable cause. It substitutes

instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment. *Beck* v. *Ohio, supra,* 142; *Wong Sun* v. *United States,* 371 U.S. 471, 479, 480 (1963).

This Court has already made it clear that good faith on the part of the arresting officer is not enough. *Beck* v. *Ohio, supra; Henry* v. *United States,* 361 U.S. 98, 102 (1959). An Ohio case in point is *Rasey, et al.* v. *Ciccolino,* Admx. 1 Ohio App. 194; 18 C.C. (NS) 331; 24 C. D. 294 (1913).

Taking the evidence in this case in its best light, considering that the police officer did not know any of these men; had no information on any them; had no knowledge of the commission of a misdemeanor or felony; had no warrant for search or arrest; and attempted no interrogation of the arrestees; this arrest occurred on the basis of suspicion alone. Such an arrest is, of course, illegal.[4]

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[4] See Mr. Justice Douglas' dissent in *Draper* v. *United States,* 358 U.S. 307; 3 LEd 2d 327; 79 S. Ct. 329 (1959) wherein he quoted from an article written by Professors Hogan and Snee of Georgetown University, 47 Georgetown Law Journal 1, 22: "It must be borne in mind that any arrest based on suspicion alone is illegal. This indisputable rule of law has grave implications for a number of traditional police investigative practices. The round-up or dragnet arrest, the arrest on suspicion, for questioning, for investigation or on an open charge all are prohibited by law. It is undeniable that if those arrests were sanctioned by law, the police would be in a position to investigate a crime and to detect the real culprit much more easily, much more efficiently, much more economically, and with much more dispatch. It is equally true, however, that society cannot confer such power on the police without ripping away much of the fabric of a way of life which seeks to give the maximum of liberty to the individual citizen. The finger of suspicion is a long one. In an individual case it may point to all of a certain race, age group of locale. Com-

Even less than what occurred here would have constituted arrest for in order for there to be an arrest, it is not necessary that there be an application of actual force, or manual touching of the body, or physical restraint which may be visible to the eye, or a formal declaration of arrest. It is sufficient if the person arrested understands that he is in the power of the one arresting, and submits in consequence. *Kelly* v. *United States,* 111 U.S. App. D. C. 396 (1961).

When the police officer, without probable cause, approached these three men who had committed no crime, and who were standing on a public street conversing, and were restricted of their liberty of movement, and subjected to search in public view, their arrest was complete. The product of such a search was illegal as the act which produced the fruit.

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monly it extends to any who have committed similar crimes in the past. Arrest on mere suspicion collides violently with the basic human right of liberty. It can be tolerated only in a society which is willing to concede to its government powers which history and experience teach are the inevitable accoutrements of tyranny."

Also see *Vagrancy and Arrest* on Suspicion, by William O. Douglas, Associate Justice, United States Supreme Court, 70 Yale Law Journals, at page 12: "There is no crime known as 'suspicion' nor is there any Federal crime known as 'holding' for 'investigation' . . . Arrests for suspicion are not countenanced by the Bill of Rights. The Fourth Amendment allows arrests—as well as searches—only for 'probable cause'. . . . Under our system the arrest is warranted not by what the police discover afterwards but by what they knew at the time . . . The result is that arrests on 'suspicion' are unconstitutional at the local, as well as at the federal level."

III.

Substituting the Standard "Reasonably Suspects" for "Probable Cause", Violates the Fourth and Fourteenth Amendments.

This Court has made it plain that federal applications of Fourth Amendment concepts, while not placing a straight-jacket on state process, does provide a minimal standard for all courts. *Ker* v. *California,* 374 U.S. 23 (1963). In fine, *Ker* provides a foundation upon which the State courts may build but not undermine:

> Findings of reasonableness . . . [by state trial courts] are respected only insofar as consistent with federal constitutional guarantees. As we have stated above and in other cases involving federal constitutional rights, findings of state courts are by no means insulated against examination here. . . . (bracketed material supplied) *Ker* v. *California,* at pp. 33-34

When the Ohio Court of Appeals asserts:

> . . . There is no mandate in the Mapp opinion that the states henceforth must abide by all the interpretations of the federal courts. (Appendix B, page 41)

it ignores *Ker* and misstates the rule by half. The thrust of *Ker* is that the States may extend, but not contract federal applications of the Fourth Amendment.

Relying on its own dictum the Court of Appeals decision[5] proceeds to rationalize it pragmatically by stating

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[5] The Supreme Court of Ohio dismissed the petitioners' appeals *sua sponte* without opinion on the ground no substantial constitutional question was involved.

flatly that "The necessities of law enforcement in large urban areas require the procedures utilized in the instant case". (Appendix B, page 31)[6]

In the interest of this purportedly pragmatic objective the Court of Appeals hinges the propriety of the ultimate arrest largely upon whether the detective in this case had, in the first place, a right to stop and question the petitioners and—from that enterprise—acquired "reasonable grounds" to make the frisk, which produced the gun and validated the consequent arrest. (Appendix B, pp. 39-41)

This syllogism is used by the Court to uphold the police action and the admissibility of the acquired evidence even though there was no ground for arrest prior to the questioning (R. 47, 118-121), nothing in response to the questioning to raise probable cause (or for that matter reasonable ground or any other ground) for arrest (R. 16-20), and *no arrest* until *after the petitioners had been physically handled* (R. 127)[7] because of the detective's feeling that "they may have a gun" (R. 44-47, 118-121, 137), and the guns discovered.

In this posture, these petitioners and, more importantly, all citizens are at the mercy of the police "sixth sense" and the situation is not improved by the Appellate Court's arrest liturgy:

> "It is readily apparent that a required element of an arrest is the *intent* of the officer to arrest. . . . In the

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[6] We resist the temptation to comment on the implication that observance of constitutional standards undercuts law enforcement.

[7] The Court of Appeals below specifically held that the arrest did not take place until after the officer found the gun. (See Appendix B, p. 39.) Necessarily the "search", i.e. frisk, preceded the cause for arrest on the facts of this case.

instant case, when the detective approached the defendant, he had, . . . no intention at all to arrest, but only to inquire as to the defendant's activities." (Appendix B, p. 37)

For whatever may be said of intent as an element in arrest, on this record there was nothing in the questioning to raise probable cause to arrest (only names were asked for and given R. 17) and no arrest made until after a physical invasion of the petitioners' persons and, therefore, no justification for the search as incidental to a valid arrest.[8] This obvious point ought not be blurred or glossed over by simple incantation about intent.

It is apparent the Court below treated "reasonable grounds" as a standard less demanding than "probable cause".[9] What it is saying, in effect, is that an occasion for questioning which raises no probable cause may legalize a search which may yield fruits in turn legalizing an arrest and it matters little whether one talks of "reasonable grounds" or "probable cause" for both depend upon the illegal acquisition for their existence. Petitioners had thought the day long past when "fruits" would qualify a search.

The argument that necessity requires such a result ought not to be persuasive. There has never been a time when

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[8] To avoid illegal arrest, the court below apparently finds *no* arrest. Even if this was an aid, it is possible to wonder what petitioner's status was as the detective's sixth sense took him into and through petitioners' pockets.

[9] Any problem in equating probable cause and reasonable grounds was avoided in *Berger* v. *New York* (S. Ct. 6/12/67) 35 L. W. 4649, 4652 by the parties' agreement that the concepts were equivalent under the New York law.

some practical argument could not be mounted to justify law enforcement outrages. No doubt the thumb-screw and the rack would "aid" law enforcement from some points of view. However, we have staked our Constitutional and governmental lives on the policy of the Fourth Amendment —a policy no doubt that involves some risk. But "Constitutional law, like other mortal contrivances, has to take some chances", Mr. Justice Holmes in *Blinn* v. *Nelson*, 222 U.S. 1, 7 (1911).

And it is a serious question whether ordered government does not run greater risks from tinkering with the fundamental concepts [e.g. the substitution of "reasonable grounds", a term of little experienced content for probable cause—a concept made meaningful by extensive interpretation] than in adhering steadfastly to constitutional fundamentals. However, it is again emphasized that a wordy formulation will not cure the evil here. For the fruits of an illegal search were used to justify an arrest which concededly came *after* the search.

The struggle for liberty has been too long and too bitter to surrender the privacy of one's person to the subjective vagaries of a policeman's mind. It is not his intent nor his sixth sense which must determine constitutional rights but objective facts supporting probable cause and no warrantless invasion of the person can stand unless present probable cause for arrest has culminated in arrest *before* the intrusion.

The Court below finds historical support for its view that "proper" authority may stop and question persons in suspicious circumstances. We are told that this "right" to question has roots in "early English practice where it

was approved by the courts and common law commentators". (Appendix B, p. 31) One may concede a right to stop and question under proper circumstances without ever reaching the heart of the question in the present case. For in this case, far more than questioning is involved. Here, the questioning did not go beyond identification. Therefore, there was no reason for the invasion of the person which took place. Under such circumstances early English authority is of little consequence. Nonetheless it is worth noting that the Fourth Amendment is, in large measure, a product of a revolution against English law as applied to the American colonies. It is not an accident that so many colonies adopted bills of rights or their equivalent nor that so many emphasized their abhorence of general warrants. See, p.e. *The Virginia Declaration of Rights*, 10. Moreover, security for liberty is planted in quicksand if too much confidence is placed in support acquired from English law in the 17th and 18th Centuries. The *Areopagitica* was not generated by a free press and history can provide many English examples unduly limiting liberties now taken for granted both here and in England. See Rutland, *The Birth of the Bill of Rights—1776-1791* Chapter 1.[10] It can never be emphasized enough that those liberties were not secured by ambiguous exceptions to basic safeguards.

The Fourth Amendment is essentially a procedural guarantee. As such it protects those "indispensable essence[s] of liberty" so dramatically described by Mr. Justice Jack-

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[10] Collier Books Edition 1962. Originally published by the University of North Carolina Press for the Institute of Early American History and Culture, Williamsburg, Virginia.

son in *Shaughnessy* v. *United States,* 345 U.S. 206, 224 (1953):

> Only the untaught layman or the charlatan lawyer can answer that procedures matter not. Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied. Indeed, if put to the choice, one might well prefer to live under Soviet substantive law applied in good faith by our common-law procedures than under our substantive law enforced by Soviet procedural practices.

Petitioners urge this Court to preserve the procedural essence of the Fourth Amendment by repudiating the exception carved out by the court below, accompanied by a clear direction that State procedures will satisfy Due Process only if Federal constitutional standards are observed.

Conclusion

It is our position that the substitution of a stop and frisk doctrine or any standard less than the probable cause standard set forth in the Fourth Amendment violates both the Fourth and Fourteenth Amendments.

We invite an independent examination of the record in this case by this Court in order to determine the petitioners' constitutional rights. In *Beck* v. *Ohio, supra,* this Court said:

> . . . While the Court does not sit as in nisi prius to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights,

> make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the state court findings, such as a finding as to the reasonableness of a search and seizure, the constitutional criteria established by the Supreme Court have been respected.

In view of this, we cannot believe that where the trial court has found an arrest to be unlawful, that it can then admit evidence seized incident to the unlawful arrest, refuse to apply search and seizure law, and justify the same on a doctrine of "stop and frisk". Justice Roger J. Traynor in his article, "Mapp vs. Ohio at large in the Fifty States," Duke Law Journal, Volume 1962, page 319, said this:

> The exclusionary rule of 1961 that now binds all the states is no mere rule of evidence, but part and parcel of the Constitution. It took time to deliver it to its destiny, but there is no longer any question that it has arrived.

This conviction should be reversed and the evidence suppressed.

Respectfully submitted,

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APPENDICES

APPENDIX A

Opinion of the Court of Common Pleas of Cuyahoga County, Ohio

Friedman, J. Gentlemen, it was suggested yesterday that briefs be filed and I stated that it was not necessary, in light of the fact that I have given this matter considerable attention as to the law, and the only question before me was to determine the facts so the proper law can be applied.

There is no question about the facts in this case, so I don't think it is necessary for me to repeat at length save and except to state that the police officer of many years of service and experience had observed the action of the defendants which indicated to him that they were casing a robbery.

There is no doubt in my mind that the officer, based upon his training, length of service, and experience as a police officer and detective, assigned in the area which he had been placed, and doing the job he had been doing, had reasonable cause to believe and to suspect that the defendants were conducting themselves suspiciously and some interrogation should be made of their action.

The Supreme Court of the United States has in many cases of recent years expressed itself clearly and distinctly that a general search and seizure is in violation of the Fourth Amendment unless the search is done with a proper warrant from the court, or if the search is made in connection with a lawful arrest and is contemporaneous and incidental to such arrest. Henry v. U.S., 361 U.S. 98, 4 L. Ed. (2d), 134. Ker v. California, 374 U.S. 23, 10 L. Ed. (2d), 726; Mapp v. Ohio, 367 U.S. 643, 6 L. Ed. (2d) 1081.

There is no evidence that any warrant had been issued for a search or frisk and I am not going to stretch the facts and say that there was a lawful arrest prior to the frisk of the defendants. I believe it would be stretching the

facts beyond reasonable comprehension and foolhardy to say there was a lawful arrest, because there wasn't, from the facts as presented.

It has been frequently stated by the U. S. Supreme Court that a state may establish its own rules and standards pertaining to search and seizure so long as these rules and standards do not violate the substance and spirit of the Fourth Amendment. It would certainly follow that the same rule would apply to the problem of "stopping and frisking" of an individual by a police officer where the facts justify.

In the case of Ker v. California, 374 U.S. 323, 10 L. Ed. (2d) 726, the court pronounced: "A state is not precluded from developing workable rules governing searches to meet the practical demands of effective criminal investigation and law enforcement that does not violate the constitutional standards of what is reasonable search and seizure."

Our courts in Ohio have on many occasions expressed that a police officer has the right to stop a suspicious person for the purpose of interrogation. Therefore, can it be said that the frisking of said person by the officer for the purpose of his own safety is a standard set by our state that is violative of the Fourth Amendment, or is it a proper guidance to meet the practical demands of effective criminal investigation and the safety of the officer performing his sworn duty? This Court believes that it is the latter view that would be prevailing and that such conduct would not be held as a violation of the Fourth Amendment.

We cannot forego and forget that police officers have a job to do, and they must do the job in connection with crime which has been on the increase.

At the same time a police officer cannot—as far as this Court is concerned—and will not be permitted to stop and frisk an individual simply because he has a suspicion, a mere suspicion, unless they are reasonable circumstances justifying a frisk.

This Court believes there is a distinction between stopping and frisking, and search and seizure.

A search is primarily for the purpose of trying to obtain evidence in connection with the commission of a crime, that the police officer may reasonably believe that a crime has been committed or might be committed.

A frisking is strictly for the protection of the officer's person and his life.

There was reasonable cause in this case for the officer, Detective McFadden, to approach these individuals and pat them. He approached them, and for his own protection frisked them. He did not go into their pockets. Had he gone into their pockets and obtained evidence, as an example, narcotics or illegal slips, there would be no question of an illegal search and seizure.

He merely tapped them about the outer part of their bodies to determine if they had any weapons or guns, for his own personal protection, and by doing so he discovered that two of the three individuals had concealed guns, and the guns are the fruit of the frisk, and not a search.

In the case of People v. Rivera (7/10/64) decided by New York Court of Appeals, 33 U. S. Law Week, 2044 July 28, 1964, the court stated that a policeman has the authority to stop and question a suspect. "Prompt inquiry into suspicious or unusual conduct is an indispensable power in the orderly government of a large urban communities." (Sic)

The frisk is essential to the stop for without the latter the answer to the police officer may be a bullet, and a loaded pistol discovered during the frisk is admissible.

In the case of People v. Martin, 46 Cal. (2d) 106, the court similarly upheld stop and frisk by an officer, and the court in effect stated the security of public order and lives of the police are to be weighed against a minor inconvenience and petty indignity.

I may say at this time, I am a great believer of the personal rights propounded by our Supreme Court, reiterated and reaffirmed, neglected over the years, and given to us under the Fourth Amendment, and other amendments of the U. S. and State Constitutions.

But police officers in a community also have rights under the constitution, and rights given to them by virtue of their office, and one of their rights as I have indicated is that when the circumstances justify and there is a reasonable suspicion, and for his own personal protection, to stop the individual or individuals and not search, but to frisk, to determine if there are weapons for his own personal safety; and finding the weapon by frisking is the fruit of the stop and frisk, in the same relation that the courts refer to the fruits of the crime on a search and seizure. Ballard v. State, 43 Ohio St., 340; Clark v. DeWalt, 65 Ohio Law Abs., 193, 203.

I believe that I reiterate again that search and seizure law cannot be applied to this particular case, although Mr. Reuben Payne endeavored to show there was a lawful arrest, but the Court cannot agree. If there was an arrest it came subsequent to the frisk.

But as I have stated, and I repeat again, there is a distinction between a frisk and a search and seizure.

This matter is of great importance and of great concern, and I certainly hope that counsel will endeavor to have this question determined by the Appellate Courts, for it is most desirable that we have clearness with respect to this problem and that the police officers know what they may do and can do in a stop and frisk matter.

The motion in each case is overruled, and exception to the defendants. It is so ordered.

APPENDIX B

Opinion of the Court of Appeals of Ohio, Cuyahoga County, Eighth District

Silbert, C.J.

This is an appeal on questions of law from a judgment and sentence imposed by the Court of Common Pleas of Cuyahoga County.

John W. Terry, the appellant herein, was indicted on a charge of carrying a concealed weapon in violation of Section 2923.01, Revised Code. A pre-trial motion to suppress the evidence was denied and upon a plea of not guilty, the Court, sitting without a jury, returned a verdict of guilty.

The relevant facts are as follows: At approximately 2:30 in the afternoon of October 31, 1963, a Cleveland detective with thirty-nine years of experience observed two persons, later identified as John W. Terry and Richard D. Chilton, engaged in behavior, on the corner of East 14th Street and Euclid Avenue (in downtown Cleveland), which immediately attracted his attention and aroused his suspicions. Positioning himself across the street he observed these men for approximately ten to twelve minutes as they alternately left the corner on which the other was stationed, walked several hundred feet up the Huron Road block, peered into the window of either a jewelry store or an airline office and then returned to the corner to converse with the other. In turn the other person would leave the corner, repeat these actions and return to the corner. This procedure was repeated at least two to five times by both men. During this period, a third man, later identified as Carl Katz, approached the corner, spoke briefly to the two men and then departed.

After ten to twelve minutes of this behavior, Terry and Chilton left the corner and proceeded west on Euclid Ave-

nue several hundred feet to where they again met Katz. The three then engaged in a conversation. As the detective testified: " * * * I didn't like their actions on Huron Road, and I suspected them of casing a job, a stick-up * * * ." With this belief in mind, the detective approached the three men, identified himself and asked for their names. Receiving only a mumbled response, the detective turned the defendant around, quickly "patted down" the outside of his clothing, and, perceiving a hard object in the inner breast pocket of his topcoat, inserted his hand and removed a fully loaded automatic. At this point the detective ordered the three men into a store, told them to face the wall and yelled to a store clerk to "call the wagon." He then proceeded to "pat down" Chilton and upon perceiving a hard object in the lefthand pocket of his topcoat, inserted his hand and removed a fully loaded revolver. A similar "patting down" of Katz revealed nothing. The three men were then taken to the police station where Terry and Chilton were charged with carrying concealed weapons. Separate trials were ordered and after a motion to suppress was denied, the defendant Terry was convicted of a felony under Section 2923.01, Revised Code.

In the defendant-appellant's brief, the following assignments of error are made:

1. The court erred in not sustaining defendant's Motion to Suppress upon making its finding that the arrest herein was illegal.

2. The Court erred in refusing to apply constitutional guarantees prohibiting illegal searches and seizures and substituting therefor a doctrine of stop and frisk. The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, sup-

ported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

This amendment prohibits an arrest without "Probable Cause," Wong Sun vs. United States, 371 U.S. 471 (1962), and is applied against the states through the fourteenth amendment, Wolf vs. Colorado, 338 U.S. 25 (1949).

However, the ambiguous nature of the word "arrest" and the issue of the right of the police to stop a person in a public street and question him under circumstances that would reasonably call for investigation and inquiry present complex legal questions in the factual context of this case. Consequently, the initial question to be resolved is the authority of the detective in the circumstances shown here to stop and question the defendant. The validity of the subsequent police action and the determination of whether the detective had adequate "reasonable grounds" to make the arrest will hinge, in part, on the propriety of the initial inquiry.

The right of the proper authorities to stop and question persons in suspicious circumstances has its roots in early English practice where it was approved by the courts and the common law commentators. See, 2 Hawkins, Pleas of the Crown, 122, 129 (6th Ed. 1787); 2 Hale, Pleas of the Crown, 89, 96-97 (Amer. Ed. 1847); Lawrence vs. Hedger, 3 Taunt. 14, 128 Eng. Rep. 6 (C. P. 1810). Today, in several states, the authority of police officers to detain suspects for a reasonable time for questioning is granted by statute. E.g., N. Y. Code of Crim. Pro., Sec. 180A (1965 Supp.); Gen. Law of R. I., Sec. 12-7-1 (1956); N. H. Rev. Stat. Ann., Ch. 594, Sec. 2 (1955); 11 Del. Ann. Code Sec. 1902 (1953); Warner, The Uniform Arrest Act, 28 Va. L. Rev. 315 (1942); Mass. Gen. Laws, Ch. 41, Sec. 98 (1961). In others, the right is recognized by the court decisions. E.g., People vs. Rivera, 14 N. Y. (2d) 441 (1964); Gisske vs. Sanders, 9 Cal. App. 13 (1908); People vs. Fagenkantz, 21 Ill. (2d) 75 (1961).

The United States Supreme Court, however, has never squarely decided whether the police may constitutionally stop and question a suspect without his consent in the absence of adequate grounds for arrest. However, the lower federal courts permit such field interrogations. See, Henry vs. United States, 361 U.S. 98, 106 (1959) (Clark, J. dissenting); Brinegar vs. U. S., 338 U.S. 160, 178 (1949) (Burton, J. concurring); Keiningham vs. United States, 307 F. (2d) 632 (D. C. Cir. 1962), cert. den. 371 U. S, 948 (1963); Busby vs. United States, 296 F. (2d) 328 (9th Cir. 1961), cert. den. 369 U. S. 876 (1962). The cases also indicate that an officer may stop and question even though he has insufficient grounds to make an arrest. See, Ellis vs. United States, 264 F. (2d) 372 (D. C. Cir.), cert. den. 359 U. S. 998 (1959); United States vs. Bonanno, 180 F. Supp. 71, 78 (S. D. N. Y. 1960), rev'd on other grounds sub nom., U. S. vs. Buffalino, 285 F. (2d) 408 (2d Cir. 1960), cited with approval in U. S. vs. Vita, 294 F. (2d) 524, 530 (2d Cir. 1961).

Admittedly there is some division of authority on the legality of the right to stop and question; however, the better view seems to be that the stopping and questioning of suspicious persons is not prohibited by the constitution. See, Note, 50 Cornell L. Q. 529, 533 (1965); United States vs. Vita, 294 F. (2d) 254 (2d Cir. 1961), cert. den. 369 U. S. 823 (1962). Of great persuasive authority do we consider the long line of California cases, decided under the rule of People vs. Cahan, 44 Cal. (2d) 434 (1955) in which this practice has been upheld. E.g., People vs. Martin, 46 Cal. (2d) 106 (1956); People vs. Simon, 45 Cal. (2d) 645 (1955); People vs. Jones, 176 Cal. App. (2d) 265 (1959). Also of great persuasive authority is the recent New York Court of Appeals decision in People vs. Rivera, 14 N. Y. (2d) 441 (1964) wherein this practice was also upheld. The courts of Ohio do not appear to have been squarely presented with this problem before. Therefore, we hold, in line with the great weight of authority, that a policeman may, under appropriate circumstances such as exist in this case, reason-

ably inquire of a person concerning his suspicious on-the-street behavior in the absence of reasonable grounds to arrest.

An individual who acts in a suspicious manner invites a preliminary inquiry by the proper authority. It does not unreasonably invade the individual's right to privacy to hold that the price of indulgence in suspicious behavior is a police inquiry. See, Traynor, Mapp vs. Ohio at Large in the Fifty States, 1962 Duke L. J. 319 (1962). Such a minor interference with personal liberty would "touch the right of privacy only to serve it well." Traynor, supra at p. 334. If such questioning failed to reveal probable cause, it would thereby forestall invalid arrests of innocent persons on inadequate cause and the attendant invasion of personal liberty and reputation. If it revealed probable cause, it would do more than open the way to a valid arrest. The business of the police is not only to solve crimes after they occur, but to prevent them from taking place whenever it is legally possible. As stated by the New York Court of Appeals in the recent case of People vs. Rivera, supra, at p. 444:

> "The authority of the police to stop defendant and question him in the circumstances is perfectly clear. * * * Prompt inquiry into suspicious or unusual street action is an indispensable police power in the orderly government of large urban communities. It is a prime function of the city police to be alert to things going wrong in the streets; if they were denied the right to such summary inquiry, a normal power and a necessary duty would be closed off."

Admittedly, this power to inquire may be abused. But the possibility of some future infraction should not require that the police should now be made powerless to make reasonable inquiries into suspicious behavior. If such abuses arise, we shall deal with them when the time comes. However, for the present, we hold that under the facts of this

case, the detective's inquiry was reasonable under the conditions presented.

The appellant contends, however, that in the instant case, despite a right of inquiry, the arrest took place the moment the defendant was questioned by the detective. According to his argument, since the arrest took place at the time of the initial inquiry, there was at that time no adequate "reasonable grounds" to arrest and therefore under the exclusionary rule of Mapp vs. Ohio, 367 U.S. 643 (1961), the evidence must be suppressed. In support of this the defendant appellant's brief states: "Since the police officers in this case did not conduct any interrogation of the defendant and his companions other than an inquiry of their names * * * his purpose was to arrest and not to interrogate."

A principal cause of the difficulty here is the ambiguous nature of the word "arrest". Some courts have used the term "arrest" to signify the mere act of stopping or restraining a person. But the term "arrest" is more commonly used in the technical criminal law sense as the seizure of an alleged offender to answer for a crime. Note, 39 N. Y. U. L. Rev. 1093, 1096 (1964); Commonwealth vs. Lehan, 347 Mass. 197 (1964). The cases decided by the United States Supreme Court appear to have adopted this later usage, see Carroll vs. United States, 267 U.S. 132, 136 (1925); Brinegar vs. United States, 338 U.S. 160, 163 (1949), and it is the usage that has been adopted by the courts of Ohio. In 5 Ohio Jurisprudence (2d), Arrest, Sec. 3, p. 19, "arrest" is defined as follows:

> "An arrest as the term is used in criminal law signifies the apprehension or detention of the person of another in order that he may be forthcoming to answer an alleged or supposed crime."

Similarly, in State vs. Milam, 108 Ohio App. 254, 268 (1959), this court quoted with approval the following definition of arrest:

"To constitute an 'arrest', four requisites are involved: A purpose to take the person into custody of the law, under real or pretended authority and an actual or constructive seizure or detention of his person, so understood by the person arrested."

It is readily apparent that a required element of an arrest is the *intent* of the officer to arrest. United States vs. Bonanno, supra, at 81-83. In the instant case, when the detective approached the defendant, he had, as shown by uncontradicted testimony, no intention at all to arrest, but only to inquire as to the defendant's activities. As stated in the record:

"Q. You observed these men for some ten to twelve minutes? A. That's right.

Q, You observed the mode of conduct that you have described to us? A. That's right.

Q. Did you, sir, as a police officer consider that you should investigate. A. Yes I did.

Q. * * * After they left the corner and you observed them again in front of * * * (the store where the three men met) * * * what did you do? A. I stopped them and went over and talked to them."

As to the exact time when the arrest took place the record shows:

"Q. Then in this situation you considered them to be under arrest when you ordered the store people to call the wagon? A. That's right."

The defendant appellant, however, contends that the case of Henry vs. United States, 361 U.S. 98 (1959) establishes the point that the arrest in the instant case took place the moment the defendant was stopped by the detective. However, in the *Henry* case, the government conceded in the lower courts, see 259 F. (2d) 725 (7th Cir. 1958), and adhered to the concession before the Supreme Court,

that the "arrest" occurred the moment the car in which Henry was riding was stopped by the federal agents. The Supreme Court in its opinion stated:

> "The prosecution conceded below, and adheres to that concession here, that the arrest took place when the federal agents stopped the car. This is our view of the facts of this particular case." 361 U.S. at 103

When the opinion in *Henry* is read in light of this concession, it is apparent that the court was only deciding that, in the circumstances of that case, there was no probable cause to justify an "arrest" at the time the car in which Henry was riding was stopped. See, United States vs. Bonanno, supra at p. 85; Busby vs. United States, supra. Therefore, we hold that in the instant case, the actual arrest did not occur until the defendant was ordered into the store after the loaded gun was discovered concealed on his person; Cf. Rios vs. United States, 364 U. S. 253 (1960).

Having determined that the police officer could validly inquire into the activities of the defendant, then it follows that the officer ought to be allowed to frisk, under some circumstances at least, to insure that the suspect does not possess a dangerous weapon which would put the safety of the officer in peril. See, Remington, The Law Relating to "On the Street" Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General, 51 J. Crim. L., C. & P. S. 386, 391 (1960). What is the officer to do in this situation? Are we to allow him the right of inquiry and then, when this right is exercised, reward him with an assailant's bullet? The practice of frisking is well accepted in police practice and police officers seem unanimous in stating that frisking is done for self-protection and not as a mere evidentiary fishing expedition. See, Note, Philadelphia Police Practice and The Law of Arrest, 100 U. Pa. L. Rev. 1182 (1952); Leagre, The Fourth Amendment and The Law of Arrest, 54 J.

Crim. L., C. & P. S. 393 (1963). The Uniform Arrest Act and the state statutes which provide for questioning of suspicious persons specifically allow for the frisking of a suspect. See, Warner, The Uniform Arrest Act, 28 Va. L. Rev. 315 (1942); Gen. Laws of R. I., Sec. 12-7-2 (1956); N. H. Rev. Stat. Ann., Ch. 594, Sec. 3 (1955); 11 Del. Code Ann., Sec. 1903 (1953); N. Y. Code Crim. Pro. Sec. 180a (1965 Supp.). In other states the right is recognized by court decision. See, People vs. Rivera, 14 N. Y. (2d) 441 (1964); People vs. Martin, 46 Cal. (2d) 106 (1956); People vs. Simon, 45 Cal. (2d) 645 (1955); People vs. Jones, 176 Cal. App. (2d) 265 (1959).

In the instant case this officer, of thirty-nine years experience, reasonably suspected that the defendant was "casing" a store with robbery in mind. It was also logical for this experienced detective to presume that the defendant was armed and dangerous. As stated in the record:

> "Q. Detective McFadden, can you tell us why you turned John Terry around facing the other two men, with you behind him? A. Due to my observation, the observation on Huron Road of these two men, I felt as though they were going to pull a stick-up and they may have a gun."

However, we must be careful to distinguish that the frisk authorized herein includes only a frisk for a dangerous weapon. It by no means authorizes a search for contraband, evidentiary material, or anything else in the absence of reasonable grounds to arrest. Such a search is controlled by the requirements of the fourth amendment and probable cause is essential. White vs. United States, 271 F. (2d) 829 (D. C. Cir. 1959). Therefore, we hold only that on the facts presented in the instant case, the frisk for dangerous weapons was valid as an incident to a valid inquiry by the police. Each case must be decided upon its own facts.

As a result of the valid frisk, a fully loaded automatic was discovered concealed on the person of the defendant.

The unauthorized possession of this weapon is a felony under Section 2923.01, Revised Code. According to the uncontradicted evidence in this case, the defendant was not arrested until after he was ordered into the store. At the moment of the arrest, the detective had reasonable grounds to believe a felony was being committed. As stated in Beck vs. Ohio, 379 U. S. 89 (1964):

> "Whether an arrest is constitutionally valid depends upon whether, at the moment the arrest is made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing the petitioners had committed or were committing an offense."

Therefore, we hold that, as the detective had validly found the gun, he had at the moment of the arrest adequate probable cause to arrest the defendant, Busby vs. United States, supra, and that the arrest in no way violated the fourth amendment.

One further point remains to be discussed concerning defendant appellant's contention that the arrest occurred at the time of the initial questioning and therefore under the exclusionary rule of Mapp vs. Ohio, 367 U. S. 643 (1961), the evidence must be suppressed. Although we had held that the arrest in this case did not take place until the defendant was ordered into the store, we must note in passing that even if the arrest took place as appellant contends, it does not necessarily follow that this evidence must be suppressed.

The Mapp exclusionary rule was imposed upon the states not because of some command inherent in the fourth amendment, but rather because the Supreme Court believed that it was the only way the police could be forced to respect the fourth amendment. If the police could not obtain a conviction using evidence unlawfully obtained,

they would have no incentive to conduct illegal searches. If we keep in mind this raison d'etre of the exclusionary rule, we can guard against confusion in the attendant rules that are developed. A judicial rule rendering evidence produced as the result of a frisk inadmissible would fail to deter the police from frisking suspects believed to be armed as police frisk for their own protection rather than for the purpose of looking for evidence. A rule of inadmissibility in such cases could only result in allowing the armed criminal to go free although failing to any meaningful extent to protect individual liberty. The exclusionary rule of illegally obtained evidence cannot be interpreted solely to provide a tidy "fox hunting" theory of criminal justice. The purpose of the exclusionary rule is to control police misconduct and in this context it must be applied. Traynor, Mapp vs. Ohio At Large In the Fifty States, 1962 Duke L. J. 319 (1962); Note, 50 Cornell L. Q. 529 (1965).

Furthermore, even if the Supreme Court would hold that federal officers may not inquire into suspicious street activities or frisk in the absence of probable cause to arrest, this does not necessarily invalidate the applicable state rules. There is no mandate in the Mapp opinion that the states henceforth must abide by all the interpretations of the federal courts. Traynor, Mapp vs. Ohio At Large In the Fifty States, supra, at 320. Local problems of law enforcement are quite different from federal problems, and the range of crimes encompassed by the states' judisdiction creates more complicated patterns to be dealt with. The states are not precluded from developing "workable rules" governing arrest, searches and seizures to meet the practical demands of effective criminal investigation and law enforcement provided these rules do not violate the constitutional proscriptions against unreasonable searches and the concomitant command that evidence so seized is inadmissible against one who has standing to complain. Ker vs California, 374 U. S. 23 (1963); Beck vs. Ohio, 379 U. S. 89 (1964). The necessities of law en-

forcement in large urban areas require the procedures utilized in the instant case. We agree with the District of Columbia Court of Appeals when they stated that they cannot believe that the "Supreme Court has forbidden the police to investigate crime." Trilling vs. United States, 260 F. (2d) 677, 700 (D. C. Cir. 1958).

For the reasons stated herein, the judgment of the Common Pleas Court is affirmed.

Exceptions. Order see journal

Artl., J. and Corrigan, J. concur.

APPENDIX C

Order Extending Time to File Petition for Writ of Certiorari

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above entitled cause be, and the same is hereby, extended to and including March 18, 1967.

/s/ POTTER STEWART
Associate Justice of the Supreme Court of the United States.

Dated this 12th day of January, 1967.

APPENDIX D

Statute

§2923.01 Carrying of Concealed Weapons.

No person shall carry a pistol, bowie knife, dirk, or other dangerous weapon concealed on or about his person. This section does not affect the right of sheriffs, regularly appointed police officers of municipal corporations, regularly elected constables, and special officers as provided by sections 311.07, 737.10, 1717.06, 1721.14, and 2917.32 of the Revised Code, to go armed when on duty. Deputy sheriffs and specially appointed police officers, except as are appointed or called into service under said sections may go armed if they first give bond to this state, to be approved by the clerk of the court of common pleas, in the sum of one thousand dollars, conditioned to save the public harmless by reason of any unlawful use of such weapons carried by them. Persons injured by such improper use may have recourse on said bond.

Whoever violates this section shall be fined not more than five hundred dollars, or imprisoned in the county jail or workhouse not less than thirty days nor more than six months, or imprisoned in the penitentiary not less than one nor more than three years.

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 67.

JOHN W. TERRY, *et al.*,
Petitioners,

vs.

STATE OF OHIO,
Respondent.

BRIEF FOR RESPONDENT

In Opposition to a Petition for a Writ of Certiorari To the Court of Appeals of Cuyahoga County, Ohio.

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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 67.

JOHN W. TERRY, *et al.*,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

BRIEF FOR RESPONDENT

In Opposition to a Petition for a Writ of Certiorari To the Court of Appeals of Cuyahoga County, Ohio.

PRELIMINARY STATEMENT.

Every state legislative enactment dealing with the regulation of human conduct is a potential cause of inconvenience and petty indignity. This is the price we pay for being free men and for being able to live in an orderly, civilized democratic society. That price is measured in terms of the restrictions of human conduct as enunciated by the laws of the Land and the states.

Many Amici have passed before the Court in argument of this matter. Their arguments contain civil rights inferences, and problems related thereto, mixed marriages and the complications they present. The gist of their arguments is that the right of personal security, the personal liberties and the private properties of free men will be forfeited if the case at bar is affirmed.

The problem presented has no immediate relation to any of these arguments. Nor will any of the constitutional safeguards pertaining to individual liberty be forfeited by an affirmance of the appellate court's decision.

The formulation of standards of criminal due process consistent with the imperatives of individual liberty in an orderly civilized society is as much the concern of the State and its citizens as a whole as it is of these petitioners, the American Civil Liberties Union, and the other interested Amici.

With this thought the respondent is interested in guideposts in this virtually endless series of vexing legal questions as to the rights of the individual and the right of our civilized, orderly democratic society to continue to take necessary steps (in the formulating of rules and laws) for the preservation of its existence.

What the instant case does involve is the right of a police officer (society's agent) to make an on-the-street stop, interrogate and pat down for weapons (known in street vernacular as "stop and frisk.")

This vexing legal question presents its difficulty not in how far the Court should travel along the road but in deciding what road should be taken.

It is in the expectation that the Court, in performing its delicate task in the instant case, will balance the equities of the individual petitioners in protecting their right to privacy against the equities of our civilized, orderly democratic society and its need for workable rules to use in the repression of ever-increasing crime, that respondent urges affirmance.

STATEMENT OF THE CASE.

John W. Terry and Richard D. Chilton (the latter now deceased), the petitioners, were indicted on a charge of carrying concealed weapons, in violation of Section 2923.01 of the Revised Code of Ohio. The trial court overruled a pretrial motion to suppress evidence (guns) and, upon a plea of not guilty, the court, sitting without a jury, returned a verdict of guilty as to both Terry and Chilton.

The relevant facts are as follows: At approximately 2:30 p.m. on October 31, 1963, a Cleveland detective with 39 years and 4 months' police experience observed two men, later identified as John W. Terry and Richard D. Chilton, on the corner of East 14th Street, Huron Road and Euclid Avenue (in downtown Cleveland), engaging in behavior that immediately attracted his attention and aroused his suspicions. Positioning himself across the street he observed these men for approximately ten to twelve minutes. One man remained at the corner, the other walked several hundred feet up the street, peered into the window of either a diamond store or an airline office and then returned to the corner to converse with the other. The other man in turn would leave the corner, repeat the same pattern of conduct and return to the corner. This behavior pattern was repeated at least two to five times by each man. During this period, a third man, later identified as Carl Katz, approached the corner, spoke briefly with the two men, departed and stationed himself across the street. The two men resumed their pattern of conduct, each making four to six more trips. The two men then walked west on Euclid Avenue to 1120 Euclid Avenue where they encountered the third man who had spoken with them previously and who was positioned there. The detective testified: "* * * I didn't like their

actions on Huron Road, and I suspected them of casing a job, a stick-up * * *" (R. 42).

With this belief in mind, the detective approached the three men, who then were engaged in conversation, identified himself as a police officer, and asked for their names. Receiving only a mumbled, incoherent response (R. 26-27-28), the officer took hold of one (later identified as Terry), and turned him around in front of the officer facing the other two. He then patted Terry, the man in front of him. At no time did his hands reach into any pockets (R. 29-30). In patting Terry the officer felt the butt of a gun in the upper left pocket of the topcoat (R. 29). He inserted his hand under the coat and felt the handle of a gun. At this point the detective ordered the three men from the street to the interior of a nearby store. Retaining Terry by the collar of his coat he ordered all three to face the wall and place the palms of their hands against the wall. The detective then pulled Terry's coat by the collar, from the rear, removing the coat from Terry's shoulders. Exposed in the upper left inside coat pocket was a concealed revolver. The detective removed this gun (R. 185). Subsequent examination proved it to be loaded. The officer proceeded to pat down the second man, Chilton, on the outside of his clothing. He then felt an object in the left o[illegible] coat pocket which felt like a gun. He inserted his hand and removed a fully loaded revolver. A similar "patting down" of Katz revealed nothing. The three men were then taken to the police station where Terry and Chilton were charged with carrying concealed weapons.

ARGUMENT.

The instant case presents for review an example of the principle enunciated by this Court in *Ker v. California*, 374 U. S. 23, 34 (1963):

> "The states are not thereby precluded from developing workable rules governing arrest, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the states, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain. See Jones v. U. S., 362 U. S. 257 (1960).
>
> "Such a standard implies no derogation of uniformity in applying federal constitutional guarantees but is only recognition that conditions and circumstances vary just as do investigative and enforcement techniques."

The questions presented in the brief of the petitioners assume facts and conclusions which the record does not support. The respondent urges that this case presents the following propositions:

1. A police officer has the right to stop a person engaged in suspicious behavior, in the absence of probable cause for arrest, for the purpose of interrogation. Such action is not violative of the Constitution of the United States.

2. Having stopped such person, based on observation of unusual behavior but without adequate grounds for arrest, the officer has the right to "frisk" for weapons for the protection of his own safety. Such conduct is a standard set by the State of Ohio. It is not violative of the Fourth Amendment of the Constitution of the United States.

3. "Stop and frisk" is differentiated from search and seizure in that the quantum of facts required to establish probable cause to "stop and frisk" is less than the quantum of facts required to establish probable cause to arrest and search.

4. In the case at bar the lawful "frisk" produced additional evidentiary facts which gave rise to probable cause to arrest petitioners for committing a felony in the presence of the officer.

5. In the case at bar there was a lawful arrest without a warrant for the commission of a felony and a legal search incident to the arrest; therefore evidence obtained in such search was admissible at the trial.

These contentions will be considered in sequence.

I. In the stated circumstances a police officer may stop and interrogate a person.

The Court of Appeals in its opinion affirming the conviction in the case at bar has adequately framed the first question. (*State v. Terry*, 5 Ohio App. 2d 122, 214 N. E. 2d 114.)

> **"The ambiguous nature of the word 'arrest,' and the issue of the right of the police to stop a person in a public street and question him under circumstances that would reasonably call for investigation and inquiry * * * consequently, the initial question to be resolved is the authority of the detective in the circumstances shown here, to stop and question the defendant. The validity of the subsequent police action and the determination of whether the detective had adequate grounds to make the arrest will hinge, in part, on the propriety of the initial inquiry."**

"The right of the proper authorities to stop and question persons in suspicious circumstances has its roots in early English practice where it was approved by the courts and the common-law commentators. See: 2 Hawkins, Pleas of the Crown (6th Ed. 1777) 122, 129; 2 Hale, Pleas of the Crown (Amer. Ed. 1847) 89, 96-97; Lawrence v. Hedger (Common Pleas 1810) 3 Taunt. 14, 128 Eng. Rep. 6. Today, in several states, the authority of police officers to detain suspects for a reasonable time for questioning is granted by statute. E.g., New York Code of Criminal Procedure (L. 1964, Chapter 86, Section 180-a); General Laws of Rhode Island (1956), Section 12-7-1; New Hampshire Revised Statutes (1955), Chapter 594, Section 2; 11 Delaware Code (1953), Section 1902; Warner, "The Uniform Arrest Act," 28 Virginia Law Review (1942) 315; Massachusetts General Laws (1961), Chapter 41, Section 98. In others, the right is recognized by court decisions. E.g., People v. Rivera (1964), 14 N. Y. 2d 441, 252 N. Y. S. 2d 458, 201 N. E. 2d 32; Gisske v. Sanders (1908), 9 Cal. App. 13, 98 P. 43; People v. Martin (1956), 46 Cal. 2d 106, 293 P. 2d 52; People v. Jones (1959), 176 Cal. App. 2d 265, 1 Cal. R. 210; and People v. Faginkrantz (1961), 21 Ill. 2d 75, 171 N. E. 2d 5."

In *Ker v. California*, 374 U. S. 23 (1963), the Court has stated that the states are not precluded from developing workable rules governing arrest, searches and seizures, to meet "the practical demands of effective criminal investigation and law enforcement," provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that the evidence so seized is inadmissible against one who has standing to complain.

The development of workable rules governing arrest, searches and seizures and stopping a person in a public street and questioning him under circumstances that

would reasonably call for investigation and inquiry is a legitimate exercise of the police power [1] of the State and does not contravene any constitutional provisions.[2]

Police power is not brought into existence by the constitution or by the legislature.[3] It is a power inherent in the existence of government.[4] It is the power of self protection and has its origin, purpose and scope in the general welfare, or as maintained here, the public safety.[5] The police power is asserted to protect the well-being of society and maintain the security of the social order.[6] It is invoked by the courts to sustain rules and regulations passed to provide for the public safety or welfare [7] and which do not contravene any constitutional provisions.[8] The object of the exercise of the police power is the promotion of the public good. 10 *O. J.* 2nd, Constitutional Law, Section 325, page 403.

The police power is the right of self preservation and self protection on the part of the community and its

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[1] *State v. Dilley*, 49 N. J. 460 (1967), 231 A. 2d 353, 357.

[2] *Chicago & N. W. R. Co. v. Illinois Commerce Com.*, 326 Ill. 625, 158 N. E. 376, 55 A. L. R. 654.

[3] *Franklin County v. Public Utilities Com.*, 107 Ohio St. 442, 140 N. E. 87, 30 A. L. R. 429; *Colletti v. State*, 12 Ohio App. 104, 31 Ohio C. A. 81, err overr 17 Ohio L. Rep. 364, 64 W. L. Bull. 462.

The police power of the state is not derived from the constitution of the United States, but is a power existing in them as sovereign states. *Armour & Company v. Augusta*, 134 Ga. 178, 67 S. E. 417.

[4] *Nebbia v. New York*, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A. L. R. 1469; *Lakeshore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 S. Ct. 565.

[5] *Re Rameriz*, 193 Cal. 633, 226 P. 914, 34 A. L. R. 51; *Vermont Salvage Corp. v. St. Johnsbury*, 113 Vt. 341, 34 A. 2d 188.

[6] *State v. Powell*, 58 Ohio St. 324, 50 N. E. 900; *Sweet v. Rechel*, 159 U. S. 380, 40 L. ed. 188, 16 S. Ct. 43.

[7] *Meadowcroft v. People*, 163 Ill. 56, 45 N. E. 991; *People v. Dehn*, 190 Mich. 122, 155 N. W. 744.

[8] See Note No. 2 *supra*.

exercise is justified by the necessity of the occasion. *State v. Boone,* 84 Ohio St. 346, 95 N. E. 924.

The measure of the police power is a measure of the public need.[9] It is described as the law of necessity[10] and always one of the least limitable[11] of the powers of government. It is that full final power that is involved in the administration of law as a means to the administration of practical justice.[12]

The term "police power" is not found in the Federal constitution or in the Ohio constitution.[13] It is a judicial invention. Because of its great dimensions and because it alters to keep pace with the times, courts wisely have not attempted to define it with exactness or precision.[14] Each individual case must stand upon its own footing. To approach some definition of it in relation to the case before

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[9] *State v. Henry,* 37 N. M. 536, 25 P. 2d 204, 90 A. L. R. 805.

To be a legitimate exercise of the police power, a statute must be reasonably necessary to promote the accomplishment of a public good or to prevent the infliction of a public harm. *State v. Ballance,* 229 N. C. 764, 51 S. E. 2d 731, 7 A. L. R. 2d 407.

[10] *Re Yun Quong,* 159 Cal. 508, 114 P. 835; *Randall v. Patch,* 118 Me. 303, 108 A. 97, 8 A. L. R. 65.

[11] *Queenside Hills Realty Co. v. Saxl,* 328 U. S. 80, 90 L. ed. 1096, 66 S. Ct. 850.

[12] *Wessell v. Timberlake,* 95 Ohio St. 21, 116 N. E. 43.

The police power is nothing more or less than the powers of government inherent in every Sovereignty to the extent of its dominions. *A. F. L. v. American Sash & Door Co.,* 67 Ariz. 20, 189 P. 2d 912, Affd. 335 U. S. 538, 93 L. ed. 222, 69 S. Ct. 258, 6 A. L. R. 2d 481

[13] See note No. 3 *supra.*

[14] *Colletti v. State,* 12 Ohio App. 104.

An attempt to define the reach of the police power or to trace its outer limits is fruitless; each case must turn on its own facts. *Berman v. Parker,* 348 U. S. 26, 99 L. ed. 27, 75 S. Ct. 98.

Definitions of police power which give its boundaries with precision have not been attempted by any courts. It is wise that it is so, because this, like many of the subject matters of the law, is constantly in the process of evolution and development, and must be adapted to the social, industrial, and commercial conditions of the times. *Wessell v. Timberlake,* 95 Ohio St. 21, 116 N. E. 43.

the bar we consider it as that inherent sovereignty which it is the right and duty of the government or its agents to exercise whenever public policy in a broad sense demands, for the benefit of society at large, regulations to guard its safety, order, or to insure in any respect such economic conditions as an advancing civilization of a highly complex character requires.[15]

Considering the increase in crime, and the boldness of today's criminal and his use of every modern technical device, modern society requires the exercise for the public good of the right of officers to stop persons who are engaged in suspicious activity on the streets.

Certainly the police power is circumscribed by the express limitation of the state and federal constitutions.[16]

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[15] *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 81 L. ed. 703, 57 S. Ct. 578, 108 A. L. R. 1330.

[16] *Day-Brite Lighting, Inc. v. Missouri*, 342 U. S. 421, 96 L. ed. 469, 72 S. Ct. 407, reh. den. 343 U. S. 921, 96 L. ed. 1334, 72 S. Ct. 674. The various exercises by the states of their police power stand on an equal footing, all being entitled to the same presumption of validity when challenged under the due process clause of the Fourteenth Amendment, and all being of equal dignity when measured against the commerce clause. *Bibb v. Navajo Freight Lines, Inc.*, 359 U. S. 520, 3 L. ed. 2d 1003, 79 S. Ct. 962.

The states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs so long as their laws do not run afoul of some specific federal constitutional provision, or of some valid federal law. *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U. S. 525, 93 L. ed. 212, 69 S. Ct. 251, 6 A. L. R. 2d 473.

While the police power is very broad, it is bound by constitutional limitations and cannot properly be exercised beyond such reasonable interferences with the liberty of action of individuals as are really necessary to preserve and protect the public health, safety, and welfare. *Corneal v. State Plant Board* (Fla.), 95 So. 2d 1, 70 A. L. R. 2d 845.

The police power is an attribute of sovereignty and a function that cannot be surrendered. It exists without express declaration, and the only limitation upon it is that it must reasonably tend to correct some evil or promote some interest of the state, and not violate any direct or positive mandate of the constitution. *Shea v. Olson*, 185 Wash. 143, 53 P. 2d 615, 111 A. L. R. 998, affd. on reh. 186 Wash. 700, 59 P. 2d 1183, 111 A. L. R. 1011.

It does, however, include anything which is reasonable, necessary and appropriate to secure the peace, order, protection, safety, welfare, and best interests of the public.[17]

There can be no question that the constitutional requirement of due process of law is a limitation upon the police power.[18] It may be the only real specific limitation[19] and is certainly the most important for purposes of this case if the limits of reasonableness are regarded as founded on the requirement of due process.

A reasonable exercise of the police power does not constitute a violation of due process.[20] The guarantee of due process in the exercise of police power demands only that the law shall not be unreasonable,[21] arbitrary or capricious,[22] and that the means selected shall have a real

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[17] See note No. 5 *supra.*

[18] *Euclid v. Ambler Realty Co.,* 272 U. S. 365, 71 L. ed. 303, 47 S. Ct. 114, 54 A. L. R. 1016; *State v. Creamer,* 85 Ohio St. 349, 97 N. E. 602; *Mirick v. Gims,* 79 Ohio St. 174, 86 N. E. 880; *Colletti v. State,* 12 O. App. 104.

The police power is not subject to any definite limitations, but is coextensive with the necessities of the case and the safeguarding of the public interests. *Steinberg-Baum & Co. v. Countryman,* 247 Iowa 923, 77 N. W. 2d 15.

[19] *Baton Rouge v. Rebowe,* 226 La. 186, 75 So. 2d 239.

The test of a police regulation when measured by the due process clause of the constitution is reasonableness as distinguished from arbitrary or capricious action. *State ex rel. Davis-Smith Co. v. Clausen,* 65 Wash. 156, 117 P. 1101.

The requirement of reasonableness is but a manifestation of the due process requirement, see *Hoff v. State,* 39 Del. 134, 197 A. 75.

[20] See note No. 2 *supra.*

[21] *Nashville, C. & St. L. R. Co. v. Walters,* 294 U. S. 405, 79 L. ed. 949, 55 S. Ct. 486; *Re Steube,* 91 Ohio St. 135, 110 N. E. 250.

[22] *People v. Griswold,* 213 N. Y. 92, 106 N. E. 929.

and substantial relation to the object sought to be attained.[23]

Due process of law does not forbid the sovereign to legislate to affect a class by description [24] (persons reasonably suspected of having committed or about to commit a crime) or to embrace the entire population,[25] the only requirement being that there shall be some reasonable basis and that the law shall operate equally.[26]

Government is based upon the proposition that certain inherent natural rights of the individual must be surrendered for the common good of all. If this principle were not applied, our government and our orderly society could not exist. Accordingly, regulations or conduct engaged in by virtue of the police power generally are confined to limitations upon or abrogations of constitutionally guaranteed rights. Most of the constitutional guarantees are subject to the police power of the state and may be regulated in the interest of the welfare and safety of the people. The state and federal constitutional provisions protecting personal liberties do not prohibit such regulations. They merely condition the exercise of the admitted power by securing that the end shall be accomplished by methods consistent with due process. Personal rights must yield in the public interest to the valid exercise of the police power of the state. Liberty does not import an absolute right to be at all times and in all circumstances

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[23] *Sandstrom v. California Horse Racing Board,* 31 Cal. 2d 401, 189 P. 2d 17, 3 A. L. R. 2d 90, Cert. den. 335 U. S. 814, 93 L. ed. 369, 69 S. Ct. 31.

[24] *State ex rel. Schneider v. Gullatt Cleaning and Laundry,* 32 O. N. P. N. S. 121.

[25] *Aetna F. Ins. Co. v. Jones,* 78 S. C. 445, 59 S. E. 148.

[26] *Standard Oil Co. v. Marysville,* 279 U. S. 582, 73 L. ed. 856, 49 S. Ct. 430; *Davis v. State,* 26 Ohio App. 340, 159 N. E. 575, affd. 118 Ohio St. 25, 160 N. E. 473, error dismd. 277 U. S. 571, 72 L. ed. 993, 48 S. Ct. 432.

wholly freed from restraint. There are many restraints to which every person is necessarily subject for the common good.[27] This Court has held that a reasonable abridgement of the constitutional guarantees will be sustained under the police power.[28]

This Court, however, has never squarely decided whether the police may constitutionally stop and question a suspect without his consent in the absence of adequate grounds for arrest. However, the lower federal courts permit such field interrogations. See, *Henry v. United States,* 361 U. S. 98, 106 (1959) (Clark, J. dissenting); *Brinegar v. U. S.,* 338 U. S. 160, 178 (1949) (Burton, J. concurring); *Keiningham v. United States,* 307 F. (2d) 632 (D. C. Cir. 1962), cert. den. 371 U. S. 948 (1963); *Busby v. United States,* 296 F. (2d) 328 (9th Cir. 1961), cert. den. 369 U. S. 876 (1962). The cases also indicate that an officer may stop and question even though he has insufficient grounds to make an arrest. See *Ellis vs. United States,* 264 F. (2d) 372 (D. C. Cir.), cert. den. 359 U. S. 998 (1959); *United States vs. Bonnano,* 180 F. Supp. 71, 78 (S. D. N. Y. 1960), rev'd on other grounds sub nom., *U. S. vs. Buffalino,* 285 F. (2d) 408 (2d Cir. 1960), cited with approval in *U. S. vs. Vita,* 294 F. (2d) 524, 530 (2d Cir. 1961).

As stated in the opinion of the Court of Appeals:

> "Admittedly there is some division of authority on the legality of the right to stop and question; however, the better view seems to be that the stopping and questioning of suspicious persons is not prohibited by the constitution. See, Note, 50 Cornell L. Q. 529, 533 (1965); United States vs. Vita, 294 F. (2d) 524 (2d

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[27] *Benjamin v. Columbus,* 167 Ohio St. 103, 146 N. E. 2d 854, Cert. den. 357 U. S. 904, 2 L. ed. 2d 1155, 78 S. Ct. 1147.

[28] See 16 *Am. Jusp.* 2d Const. L. Sec. 287, 307, P. 556, 602.

Cir. 1961), cert. den. 369 U. S. 823 (1962). Of great persuasive authority do we consider the long line of California cases, decided under the rule of People vs. Cahan, 44 Cal. (2d) 434 (1955), 282 P. 2d 905, in which this practice has been upheld. E.g., People vs. Martin, 46 Cal. (2d) 106 (1956), 293 P. 2d 52; People vs. Simon, 45 Cal. (2d) 645 (1955), 290 P. 2d 531; People vs. Jones, 176 Cal. App. (2d) 265 (1959), 1 Cal. Rep. 210. Also of great persuasive authority is the recent New York Court of Appeals decision in People vs. Rivera, 14 N. Y. (2d) 441 (1964), 201 N. E. 2d 32, wherein this practice was also upheld. The courts of Ohio do not appear to have been squarely presented with this problem before. Therefore, we hold, in line with the great weight of authority, that a policeman may, under appropriate circumstances such as exist in this case, reasonably inquire of a person concerning his suspicious on-the-street behavior in the absence of reasonable grounds to arrest.

"An individual who acts in a suspicious manner invites a preliminary inquiry by the proper authority. It does not unreasonably invade the individual's right to privacy to hold that the price of indulgence in suspicious behavior is a police inquiry. See, Traynor, 'Mapp vs. Ohio at Large in the Fifty States,' 1962 Duke Law Journal 319 (1962). Such a minor interference with personal liberty would 'touch the right of privacy only to serve it well.' Traynor, supra at p. 334. If such questioning failed to reveal probable cause, it would thereby forestall invalid arrests of innocent persons on inadequate cause and the attendant invasion of personal liberty and reputation. If it revealed probable cause, it would do no more than open the way to a valid arrest. The business of the police is not only to solve crimes after they occur, but to prevent them from taking place whenever it is legally possible. As stated by the New York Court of Appeals in the recent case of People vs. Rivera (1964), 14 N. Y. 2d 441, at p. 444, 201 N. E. 2d 32:

'The authority of the police to stop defendant and question him in the circumstances is perfectly clear. * * * Prompt inquiry into suspicious or unusual street action is an indispensable police power in the orderly government of large urban communities. It is a prime function of the city police to be alert to things going wrong in the streets; if they were denied the right to such summary inquiry, a normal power and a necessary duty would be closed off.'

"Admittedly, this power to inquire may be abused. But the possibility of some future infraction should not require that the police should now be made powerless to make reasonable inquiries into suspicious behavior. If such abuses arise, we shall deal with them when the time comes. However, for the present, we hold that under the facts of this case, the detective's inquiry was reasonable under the conditions presented."

It is well settled that there is nothing ipso facto unconstitutional in the brief detention of citizens under circumstances not justifying an arrest, for the purpose of limited inquiry in the course of routine police investigation. *Rios v. U. S.*, 364 U. S. 253, 80 S. Ct. 1431, 4 L. ed. 2d 1688 (1960); *Busby vs. U. S.*, 296 Fed. (2d) 328 (9th Cir. 1961).

The local policeman, in addition to having a duty to enforce the criminal laws of his jurisdiction, is also in a very real sense a guardian of the public peace and he has a duty in the course of his work to be alert for suspicious circumstances, and provided that he acts within constitutional limits, to investigate whenever such circumstances indicate to him that he should do so. *Frye vs. U. S.*, 315 Fed. 2d 491, 494 (9th Cir. 1963).

Due regard for the practical necessities of effective law enforcement requires that the validity of brief informal detention be recognized whenever it appears from

the totality of the circumstances that the detaining officers could have had reasonable grounds for their action. A founded suspicion is all that is necessary, some basis from which the courts can determine that detention was not arbitrary or harassing. *Wilson vs. Porter,* 361 Fed. 2d 412, 415 (9th Cir. 1966).

Reasonable investigatory techniques may be pursued by police indoors as well as outdoors and it is not unusual for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes. *People vs. Machel,* 44 Cal. Rpts. 126. Generally, police officers may detain and question persons when the circumstances are such as would indicate to a reasonable man in like position that such course is necessary to proper discharge of duty. *People vs. Machel,* 44 Cal. Rpts. 126,

II. The right of the officer to "frisk."

Having stopped such person, based on observation of unusual behavior but without adequate grounds for arrest, the officer has the right to "frisk" for weapons for the protection of his own safety. Such conduct is a standard set by the State of Ohio. It is not violative of the Fourth Amendment of the Constitution of the United States.

The petitioners argue that any "frisk" is a search in the full meaning of the term. The "frisk" as it evolved in the events that actually occurred in this case, and as it is generally understood in police usage, is a contact or patting of the outer clothing of a person to detect by the sense of touch whether a concealed weapon is being carried.[29] The frisk is without question less such an invasion

[29] *People v. Rivera,* 14 N. Y. 2d 441, 201 N. E. 2d 32, 252 N. Y. S. 2d 458 (1964), cert. den. 379 U. S. 978. See also *People v. Koelzer,* 222 C. A. 2d 20, 34 Cal. Reptr. 718 (1963).

of the person in degree than an initial full search of the person would be. It ought to be distinguishable also on pragmatic grounds from the degree of constitutional protection that would surround a full-blown search of the person. This is exactly the distinction the trial judge made in rendering his opinion, affirmed by the Court of Appeals and review refused by the Ohio Supreme Court.

The test to be applied in determining whether the frisk is reasonable, as a valid exercise of the police power and in keeping with the Ker pronouncement (*Ker vs. California,* 374 U. S. 23 (1963)) that the states may develop workable rules to meet the practical demands of effective criminal investigation and law enforcement, is the same test used in determining the reasonableness of a search and seizure: Whether the thing done in sum of its form, scope, nature, incidents and effects impresses as being fundamentally unfair or unreasonable in the specific situation when the immediate end sought is considered against the private right affected. *State vs. Hagan,* 137 N. W. 2d 895; *U. S. vs. Cook* (D. C. E. D. Tenn. 1962), 213 Fed. Supp. 568; *Schwimmer vs. U. S.* (C. A. 8th Dist. 1956), 232 Fed. 2d 855, cert. den. 352 U. S. 833, 77 S. Ct. 48, 1 L. ed. 2d 52.

Persons found under suspicious circumstances are not clothed with a right of privacy which prevents police officers from inquiring as to their identity and actions. The *essential needs of public safety* permit police officers to use their *faculties of observation and to act thereon within proper limits* (our emphasis). *State vs. Herdman,* 130 N. W. 2d 628.

The right of the police to investigate gives rise to the right to conduct a reasonable search for weapons in order to protect safety of officers. *People vs. Garrett,* 47 Cal. Rep. 731 (1966).

If we recognize the authority of the police to stop an individual and inquire concerning unusual street events (*U. S. vs. Vita*, 294 Fed. 2d 524, 530; *People vs. Marendi*, 213 N. Y. 600, 609; in a similar direction *U. S. vs. Bonanno*, 180 F. Supp. 71, 81, 83, which, although reversed on other grounds sub nom., *U. S. vs. Buffalino*, 285 F. 2d 410, was cited on this point with approval in *Vita* at page 530), we are required to recognize the hazards involved in this kind of public duty. The answer to the question propounded by the policeman may be a bullet; in any case the exposure to danger and the safety and welfare of the officer (the public interest) could be very great. The frisk for weapons is a reasonable and constitutionally permissible precaution to minimize that danger in the interest of safety and welfare. We ought not in deciding what is reasonable close our eyes to the actualities of street dangers encountered in performing this kind of public duty.[30]

This question can best be summed up by quoting that pertinent part of the Ohio Court of Appeals opinion regarding frisk:

> "Having determined that the police officer could validly inquire into the activities of the defendant, then it follows that the officer ought to be allowed to 'frisk,' under some circumstances at least, to insure that the suspect does not possess a dangerous weapon which would put the safety of the officer in peril.

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[30] Police experience amply proves the need to search. For example, *Barbee v. Warden*, 331 F. 2d 842 (1964), records the misfortune of an officer who failed to make an adequate search. When the officer took his prisoner to a callbox, the man drew a gun, shot the officer, and fled.

Failure to make a proper search is said to be a circumstance in 19 percent of the cases in which police officers are shot. Police Officer Shootings—A Tactical Evaluation, *The Journal of Criminal Law, Criminology and Police Science*, March 1963.

See, Remington, 'The Law Relating to "On the Street" Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General,' 51 Journal of Criminal Law, Criminology and Police Science 386, 891 (1960). What is the officer to do in this situation? Are we to allow him the right of inquiry and then, when this right is exercised, reward him with an assailant's bullet? The practice of 'frisking' is well accepted in police practice, and police officers seem unanimous in stating that 'frisking' is done for self-protection and not as a mere evidentiary 'fishing expedition.' See: 'Philadelphia Police Practice and the Law of Arrest,' 100 University of Pennsylvania Law Review 1182 (1952); Leagre, 'The Fourth Amendment and the Law of Arrest,' 54 Journal of Criminal Law, Criminology and Police Science, 393 (1963). The Uniform Arrest Act and the state statutes which provide for questioning of suspicious persons specifically allow for the 'frisking,' of a suspect. See, Warner, 'The Uniform Arrest Act,' 28 Virginia Law Review 315 (1942); General Laws of Rhode Island, Section 12-7-2 (1956); New Hampshire Revised Statutes, Chapter 594, Sec. 3 (1955); 11 Delaware Code, Sec. 1903 (1953); New York Code of Criminal Procedure (L. 1964), Chapter 86, Section 180-a. In other states the right is recognized by court decision. See, People vs. Rivera, 14 N. Y. (2d) 441 (1964); People vs. Martin, 46 Cal. (2d) 106 (1956); People vs. Simon, 45 Cal. (2d) 645 (1955); People vs. Jones, 176 Cal. App. (2d) 265 (1959).

"In the instant case this officer of thirty-nine years' experience reasonably suspected that the defendant was 'casing' a store with robbery in mind. It was also logical for this experienced detective to presume that the defendant was armed and dangerous. As stated in the record:

> Q. Detective McFadden, can you tell us why you turned John Terry around facing the other two men, with you behind him?

A. Due to my observation, the observation on Huron Road of these two men, I felt as though they were going to pull a stick-up and they may have a gun.

"However, we must be careful to distinguish that the 'frisk' authorized herein includes only a 'frisk' for a dangerous weapon. It by no means authorizes a search for contraband, evidentiary material, or anything else in the absence of reasonable grounds to arrest. Such a search is controlled by the requirements of the Fourth Amendment and probable cause is essential. White vs. United States, 271 F. 2d 829 (C. C. A. D. C. 1959). Therefore, we hold only that on the facts presented in the instant case, the 'frisk' for dangerous weapons was valid as an incident to a valid inquiry by the police. Each case must be decided upon its own facts."

III. "Stop and frisk" is differentiated from search and seizure in that the quantum of facts required to establish probable cause to "stop and frisk" is less than the quantum of facts required to establish probable cause to arrest and search.

While the constitutional prohibition against unreasonable searches and seizures makes no distinction between informal detention without cause and formal arrest without cause, there is a difference between "that cause" which will justify informal detention short of arrest and the probable cause standard required to justify that kind of custody traditionally denominated an arrest. *Wilson vs. Porter*, 361 Fed. 2d 412, 415 (9th Cir. 1966).

In dealing with probable cause, however, as the very name applies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. *Brinegar v. United States*, 338 U. S.

160, 93 L. ed. 1879, 69 S. Ct. 1002; *State v. Mark*, 46 N. J. 262, 271, 216 A. 2d 377 (1966); *State v. Dilley*, 49 N. J. 460, 231 A. 2d 353 (1967).

While the rule permitting temporary detention for questioning is operative under circumstances short of probable cause to make an arrest, there must exist some suspicious or unusual circumstances to authorize even this limited invasion of citizens' privacy. *People vs. Machel*, 44 Cal. Rpts. 126.

The rule that circumstances short of probable cause to make an arrest may still justify an officer stopping pedestrians, motorists, or others on the street; for questioning does not conflict with the United States Constitution Fourth Amendment forbidding unreasonable searches and seizures, but strikes a balance between a person's immunity from police interference and the community interest in law enforcement, and wards off pressure to equate reasonable cause to investigate with reasonable cause to arrest, thus protecting the innocent from the risk of arrest when no more than reasonable investigation is justified. *People vs. Michelson*, 59 Cal. Rep. 2d 448 (1963).

In addition to the pragmatic and factual distinction that is made in the case at bar between "stop and frisk" and a lawful arrest with subsequent search and seizure, these acts are distinguishable from the standpoint of the decisions of the courts in the various states on the quantum of probable cause that is necessary as to each. What constitutes sufficient probable cause in a stop and frisk situation is no more subject to a hard and fast rule than is the probable cause for an arrest and subsequent search and seizure. It is for the trial court to say in the first instance, after hearing the facts, whether there is sufficient probable cause. Each case must stand on its own merits.

This is precisely what the trial court did in the instant case. (*State v. Chilton*, 95 Ohio Law Abs. 321, 323, 324, 32 O. O. 2d 489.)

> "At the same time a police officer cannot, as far as this court is concerned—and will not be permitted to—stop and frisk an individual simply because he has a suspicion, a mere suspicion, unless there are reasonable circumstances justifying a frisk. This court believes there is a distinction between stopping and frisking and search and seizure. A search is primarily for the purpose of trying to obtain evidence in connection with the commission of a crime that the police officer may reasonably believe has been committed or might be committed. A frisk is strictly for the protection of the officer's person and his life."

The court concluded there was

> "reasonable cause for the officer * * * to approach these individuals and pat them. He approached them and for his own protection frisked them. He did not go into their pockets * * *. But police officers in a community also have rights under the constitution and rights given to them by virtue of their office, and one of those rights as I have indicated is the right *when the circumstances justify and there is a reasonable suspicion,* and *for his own personal protection,* to stop the individual or individuals and not search but to frisk, to determine if there are weapons for *his own personal safety* * * * without a warrant." (Our emphasis.)

While the constitutional prohibition against unreasonable searches and seizures makes no distinction between informal detention without cause and formal arrest without cause, there is a difference between that cause which will justify informal detention short of arrest and the probable cause required to justify that kind of custody traditionally designated an arrest. *Wilson vs.*

Porter, 361 Fed. 2d 412. This Court has held that the mere fact that information may be hearsay does not destroy its role in establishing probable cause. *Ker vs. California*, 374 U. S. 23; *Brinegar vs. U. S.*, 338 U. S. 160. In *Draper vs. U. S.*, 358 U. S. 307 (1959) the Court held that information from a reliable informer corroborated by the agent's observation as to the accuracy of the informer's description of the accused and of his presence at a particular place was sufficient to establish probable cause for an arrest without a warrant.

Generally police officers may detain and question persons when circumstances are such as would indicate to reasonable man in a like position that such course is necessary to proper discharge of duty. *People vs. Machel*, 44 Cal. Rpts. 126.

"Reasonable Cause" has been generally defined to be such state of facts as would lead a man of ordinary care and prudence to believe and consciously entertain an honest and strong suspicion that person is guilty of crime. *People v. Machel, supra.*

Question of probable cause to justify defendant's arrest and search must be tested on facts which records show were known to officers at time arrest was made. *People v. Machel, supra.* Also *People v. Hernandez*, 40 Cal. Repts. 100.

While *Mapp vs. Ohio*, 367 U. S. 643 (1961) does not deal with the question of "stop and frisk," the principles enunciated therein and approved in *Ker vs. California* are sufficiently analogous to provide us with answers to the present question:

> "Mapp sounded no death knell for our federalism, rather it echoed the sentiment of Elkins vs. U. S., supra, at 221, that a healthy federalism depends upon the avoidance of needless conflict between state and federal courts by itself urging that federal-state co-

operation and the solution of crime under constitutional standard will be promoted, if only by recognition of their now mutual obligation to respect the *same fundamental criteria in their approach*. 367 U. S. at 658." (the court's emphasis) 374 U. S. at 31.

"Second, Mapp did not attempt the impossible task of laying down a final formula for the application in specific cases of the constitutional prohibition against unreasonable searches and seizures; it recognized that we would be met with recurring questions of the reasonableness of searches, and that, at any rate reasonableness is in the first instance for the trial court * * * to determine, id. at 653, thus indicating that the usual weight be given to findings of trial courts." 374 U. S. at 32.

Due regard for the practical necessities of effective law enforcement requires that the validity of brief, informal detention be recognized whenever it appears from totality of circumstances that the detaining officers could have had reasonable grounds for their action, and a founded suspicion is all that is necessary, that is, some basis from which the court can determine that detention was not arbitrary or harassing. *Wilson v. Porter*, 361 Fed. 2d 412, 415.

The trial court's finding of reasonable cause is wholly consistent with the foregoing criteria. The court said:

"There was *reasonable cause* in this case for the officer Detective McFadden to approach these individuals and pat them. He approached them, and for his own protection frisked them." (Our emphasis.)

In the light of that language the trial court was doing exactly what this Court had expressed:

"federal-state cooperation in the solution of crime under standards will be promoted, if only by recognition of their now mutual obligation to respect the same fundamental criteria in their approach."

Since the precise question had never been decided by this Court, the trial court made every effort to follow and respect fundamental criteria of due process in determining the issue. The only innovation by the trial court was that the quantum of evidence to establish probable cause for stop and frisk need not be as great as that required for arrest, search and seizure. The opinion of the trial court abounds with fundamental criteria for deciding this question:

> (1) "I am a great believer of the personal rights propounded by our Supreme Court reiterated and reaffirmed, neglected over the years, and given to us under the Fourth Amendment, and other amendments of the United States Constitution."
>
> (2) "At the same time a police officer cannot—as far as this Court is concerned—and will not be permitted to stop and frisk an individual simply because he has a suspicion, a mere suspicion, unless there are reasonable circumstances justifying a frisk."
>
> (3) "When the circumstances justify and there is reasonable suspicion, and for his own personal protection * * * frisk to determine if there are weapons for his personal safety."
>
> (4) "* * * officer * * * assigned in the area which he had been placed, and doing the job he had been doing, had reasonable cause to believe and to suspect that the defendants were conducting themselves suspiciously and some interrogation should be made of their action."
>
> (5) "There was reasonable cause in this case for the officer to approach these individuals and pat them."

Not only did the trial court recognize its obligations and give respect to the fundamental criteria of due process in deciding this question, but it is quite evident that the Ohio Court of Appeals, as indicated by the following pas-

sages, likewise recognized their obligation and gave respect to such fundamental criteria:

> "Therefore, we hold in line with the great weight of authority that a policeman may under *appropriate circumstances*, such as exist in this case, *reasonably* inquire of a person concerning his suspicious on-the-street behavior in the absence of reasonable grounds to arrest." (Our emphasis.)
>
> "However, we must be careful to distinguish that the "frisk" authorized herein includes only a "frisk" for a dangerous weapon. It by no means authorizes search for contraband, evidentiary material, or anything else in the absence of reasonable grounds to arrest. Such a search is controlled by requirements of the Fourth Amendment and probable cause is essential. White vs. United States (C. C. A. D. C. 1959), 271 F. 2d 829. Therefore, we hold only that on the facts presented in the instant case, the "frisk" for dangerous weapons was valid as an incident to a valid inquiry by the police. Each case must be decided upon its own facts."

As to whether there was sufficient evidence which gave the officer reasonable grounds to stop, question, and frisk petitioners, respondent relies on the state of the record:

(1) Police officer on duty performing his police responsibilities.

(2) Thirty-nine years' experience.

(3) Observation of suspicious activities of petitioners and other.

(4) Concludes a stick-up is imminent.

(5) Decides to investigate and interrogate.

(6) Identifies himself as a law officer.

(7) Asked their names—receives incoherent answers.

(8) Frisked for weapon for his protection.

(9) Nature of the suspected crime—stick-up: inference of the use of a weapon and violence.

(10) The absence of assistance to the officer in relation to the number of suspects (three).

(11) The sex of the subjects—all male.

(12) The demeanor and seeming agility of the suspects and the clothing they wore, as inference of possibility of concealed weapons.

We recognize that the trial court's findings of reasonableness, as affirmed by the Ohio Court of Appeals, are respected only insofar as consistent with federal constitutional guarantees and that they are by no means insulated against examination by this Court. *Spano vs. N. Y.*, 360 U. S. 315, 316 (1959); *Thomas vs. Arizona*, 356 U. S. 390-393 (1958); *Pierre vs. Louisiana*, 306 U. S. 354, 358 (1939); *Ker vs. California*, 374 U. S. 23.

We welcome the Court's examination of the facts, in making its determinations and findings, to establish that as to reasonableness, the fundamental, i.e. constitutional, criteria laid down by this Court have been respected in every instance in the case at bar.

IV. In the case at bar the lawful "frisk" produced additional evidentiary facts giving rise to probable cause to arrest for committing a felony in the presence of the officer.

Probable cause for the arrest of petitioners, while not present at the time the officer approached these men to question them, nevertheless was present at the time of their arrest. There appears to be no question but that the trial judge, defense counsel and the prosecuting attorney are in agreement that up to the point the "frisk" produced

knowledge of the weapon probable cause for arrest did not exist.

The lawfulness of the arrest without a warrant, in turn, must be based upon probable cause, that is, where the facts and circumstances within his (the officer's) knowledge and of which he had reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Brinegar vs. U. S.*, 338 U. S. 160, quoting from *Carroll vs. U. S.*, 267 U. S. 132, 162 (1925); accord *People vs. Fisher*, 49 Cal. 2d 442, 317 P. 2d 967 (1957); *Bompensiero vs. Superior Ct.*, 44 Cal. 2nd 178, 281 P. 2nd 250 (1955); *Ker vs. California*, 374 U. S. 23.

The information within the knowledge of the officer at the time he approached the petitioners clearly furnished grounds for his investigation and interrogation. Upon identifying himself as a police officer and receiving mumbled, incoherent responses, such suspicious evasion added further probable cause to the officer's previous conclusion that a stick-up was imminent. In view of the totality of the circumstances existing at that moment it was not unreasonable for the officer to come to that conclusion. Thereupon the officer took hold of one man and patted him to determine if he had any weapons before asking further questions:

> "Q. Det. McFadden, can you tell us why you turned John Terry around facing the other two men with you behind him?
>
> A. Due to my observations, the observations on Huron Road of these two men, I felt as though they were going to pull a stick-up and they may have a gun.
>
> (R. 137) I wanted to see if they had any guns."

Had the officer frisked and found nothing there would have been no grounds for an arrest. The officer, while

frisking, through his sense of touch felt a bulge in Terry's left breast pocket, which he decided was a gun. We must at this point recall that here is an officer with 39 years' experience and training who has had countless opportunities to recognize the presence of weapons concealed under a suspect's clothing. Applying this accumulated experience to his observations of these men, the only intelligent conclusion that the experienced police officer could make was that the petitioners were at that time committing a felony in the officer's presence by carrying a concealed weapon. To this point there has been no arrest, no search. The arrest followed immediately when the men were ordered to move inside the store and place their hands against the wall. Where before there was no intent to detain, there is now; where before there was no probable cause to arrest, there is now.

The petitioners were not free to go at liberty. They were under arrest. Even though technical words "You are under arrest", were not spoken, a valid arrest had been made.

Circumstances short of probable cause to make an arrest may still justify officers stopping pedestrians or motorists on streets for questioning, and as circumstances warrant, officer may, in self protection, superficially search suspect for concealed weapons and should investigation then reveal probable cause to make an arrest, officer may arrest suspect and conduct reasonable search incidental thereto. *People vs. Machel,* 44 Cal. Rpts. 126.

To justify the seizure of a weapon which could be used against the arresting officer we shall not draw a fine line measuring the possible risks to the officer's safety. The officer should be permitted to take every reasonable precaution to safeguard his life in the process of making the arrest. *State vs. Reilly,* 402 P. 2d 741 (1965).

In *State vs. Herdman,* 130 N. W. 2d 628, the Supreme Court of Minnesota uses the following language:

> "In the argument before this court it appears to be the claim of the defendant that the evidence used against him was the product of an exploratory search without probable cause in violation of his rights under the 4th and 14th Amendments. It seems to be further urged that since Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. ed. 2d 1081, police officers are not permitted to accost a suspicious character on a public street for questioning. While the Mapp case and numerous decisions recently handed down by the United States Supreme Court clearly establish that under state and federal procedure citizens are entitled to uniform protection from unreasonable searches and seizures, we do not understand that these decisions have gone so far as to require or suggest that state police officers follow precise procedures in making arrests, searches and seizures. The Fourth Amendment protects the individual only from 'unreasonable' searches and seizures; and whether a search and seizure is 'unreasonable' must depend upon the particular facts of each case.
>
> "Nor do we feel that the legality of the arrest of defendant is tainted because the police officers accosted and interviewed defendant without actual information that he was carrying stolen property in his automobile. Under the circumstances here, the police officers did no more than what they were required to do in performance of their duties. * * *"

However convincing cases from other jurisdictions may be, this Court in cases under the Fourth Amendment has long recognized that the lawfulness of arrest by state officers for federal offenses is to be determined by references to state law insofar as it is not violative of the federal constitution. *Miller v. U. S.*, 357 U. S. 301 (1958);

U. S. v. DiRe, 332 U. S. 581 (1948); *Johnson v. U. S.*, 333 U. S. 10, 15, Note 5 (1948).

A fortiori, the lawfulness of these arrests by the officer for state offenses is to be determined by Ohio law.

Ohio Revised Code Section 2935.04 provides:

"2935.04. *When Any Person May Arrest.*

"When a felony has been committed, or there is reasonable ground to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained."

Ohio Revised Code Section 2923.01 provides in pertinent part:

"2923.01. *Carrying of Concealed Weapon.*

"No person shall carry a pistol, bowie knife, dirk, or other dangerous weapon concealed on or about his person. This section does not affect the right of sheriffs, regularly appointed police officers of municipal corporations, regularly elected constables, and special officers as provided by Sections 311.07, 737.10, 1717.06, 1721.14, and 2917.32 of the Revised Code, to go armed when on duty. * * *"

To sum up this question we again refer to our Court of Appeals Opinion:

"As a result of the valid 'frisk,' a fully loaded automatic was discovered concealed on the person of the defendant. The unauthorized possession of this weapon is a felony under Section 2923.01, Revised Code. According to the uncontradicted evidence in this case, the defendant was not arrested until after he was ordered into the store. At the moment of the arrest, the detective had reasonable grounds to believe a felony was being committed. As stated in Beck vs. Ohio, 379 U. S. 89 (1964):

'Whether an arrest is constitutionally valid depends upon whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment, the facts and circumstances within their knowledge of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing the petitioners had committed or were committing an offense.'

"Therefore, we hold that, as the detective had validly found the gun, he had at the moment of the arrest adequate probable cause to arrest the defendant, Busby vs. United States (C. C. A. 9, 1961), 296 F. 2d 328, and that the arrest in no way violated the Fourth Amendment.

"One further point remains to be discussed concerning defendant's contention that the arrest occurred at the time of the initial questioning and therefore under the exclusionary rule of Mapp vs. Ohio, 367 U. S. 643 (1961), the evidence must be suppressed. Although we have held that the arrest in this case did not take place until the defendant was ordered into the store, we must note in passing that even if the arrest took place as defendant contends, it does not necessarily follow that this evidence must be suppressed.[31]

"The Mapp exclusionary rule was imposed upon the states not because of some command inherent in the Fourth Amendment, but rather because the Supreme Court believed that it was the only way the police could be forced to respect the Fourth Amendment. If the police could not obtain a conviction using evidence unlawfully obtained, they would have no incentive to conduct illegal searches. If we keep in

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[31] Some searches made a few moments before the arrest to which they were incidental have been upheld and the evidence seized admissible. *U. S. v. Devenere*, 332 F. 2d 160 (1964); *U. S. v. Boston*, 330 F. 2d 937 (1964); *Dickey v. U. S.*, 332 F. 2d 773 (1964).

mind this raison d'etre of the exclusionary rule, we can guard against confusion in the attendant rules that are developed. A judicial rule rendering evidence produced as the result of a 'frisk' inadmissible would fail to deter the police from 'frisking' suspects believe to be armed as police 'frisk' for their own protection rather than for the purpose of looking for evidence. A rule of inadmissibility in such cases could only result in allowing the armed criminal to go free although failing to any meaningful extent to protect individual liberty. The exclusionary rule of illegally obtained evidence cannot be interpreted solely to provide a tidy 'fox hunting' theory of criminal justice. The purpose of the exclusionary rule is to control police misconduct and in this context it must be applied. Traynor, 'Mapp vs. Ohio at Large In the Fifty States,' 1962 Duke Law Journal 319 (1962); Note, 50 Cornell Law Quarterly 529 (1965).

"Furthermore, even if the Supreme Court would hold that federal officers may not inquire into suspicious street activities or 'frisk' in the absence of probable cause to arrest, this does not necessarily invalidate the applicable state rules. There is no mandate in the Mapp opinion that the states henceforth must abide by all the interpretations of the federal courts. Traynor, 'Mapp vs. Ohio at Large In the Fifty States,' Duke Law Journal (1962) 319 at 320. Local problems of law enforcement are quite different from federal problems, and the range of crimes encompassed by the states' jurisdiction creates more complicated patterns to be dealt with. The states are not precluded from developing 'workable rules' governing arrest, searches and seizures to meet the practical demands of effective criminal investigation and law enforcement provided those rules do not violate the constitutional proscriptions against unreasonable searches and the concomitant command that evidence so seized is inadmissible against one who has

> standing to complain. Ker v. California, 374 U. S. 23 (1963); Beck vs. Ohio, 379 U. S. 89 (1964). The necessities of law enforcement in large urban areas require the procedures utilized in the instant case. We agree with the District of Columbia Court of Appeals when they stated that they cannot believe that the 'Supreme Court has forbidden the police to investigate crime.' Trilling vs. United States, 260 F. (2d) 677, 700 (D. C. Cir. 1958)."

It is incorrectly argued by the petitioners that the trial court made a finding that the arrest was unlawful and that after making such a finding of illegal arrest the court should have suppressed the evidence. The fact is that the trial court never held that these men were illegally arrested in this case. The court merely said that had the arrests preceded the frisking of the men, such arrests would then have been illegal. The court then delineated the distinction between "frisking" as commonly practiced by police officers when they stop a suspect and the search of the person incident to arrest.

If we accept the law of "stop and frisk" as a benefit to society in the interest of safety and welfare, the subsequent factual situation must be looked into in the light of that law to establish whether we have a legal arrest and a search incident thereto. The facts as heretofore discussed in no way abridge the constitutional rights of the petitioners.

The petitioners contend, however, at certain points of their argument that despite a right of inquiry, the arrest took place the moment the defendant was questioned by the detective. They argue that at that time there were no adequate "reasonable grounds" to arrest and therefore under the exclusionary rule of *Mapp vs. Ohio*, 367 U. S. 643 (1961), the evidence must be suppressed. In support of this the petitioner's brief states:

"Since the police officer in this case did not conduct any interrogation of the defendant and his companions other than an inquiry of their names * * * his purpose was to arrest and not to interrogate."

A principal cause of the difficulty here is the ambiguous nature of the word "arrest" to signify the mere act of stopping or restraining a person. But the term "arrest" is more commonly used in the technical criminal law sense as the seizure of an alleged offender to answer for a crime. Note, 39 *New York University Law Review* 1093, 1096 (1964); *Commonwealth vs. Lehan*, 347 Mass. 197 (1964). The cases decided by the United States Supreme Court appear to have adopted this later usage, see *Carroll vs. United States*, 267 U. S. 132, 136 (1925); *Brinegar vs. United States*, 338 U. S. 160, 163 (1949), and it is the usage that has been adopted by the courts of Ohio. In 5 *Ohio Jurisprudence* (2d), Arrest, Sec. 3, p. 19, "arrest" is defined as follows:

"An arrest as the term is used in criminal law signifies the apprehension or detention of the person of another in order that he may be forthcoming to answer an alleged or supposed crime."

Similarly, in *State vs. Milam*, 108 Ohio App. 254, 268 (1959), the court quoted with approval the following definition of arrest:

"To constitute an 'arrest', four requisites are involved: A purpose to take the person into custody of the law, under real or pretended authority and an actual or constructive seizure or detention of his person, so understood by the person arrested."

It is readily apparent that a required element of an arrest is the intent of the officer to arrest. *United States vs. Bonanno*, 180 F. Supp. 71 at 81-83. In the instant

case, when the detective approached the defendant, he had, as shown by uncontradicted testimony, no intention at all to arrest, but only to inquire as to the defendant's activities. As stated in the record:

> "Q. You observed these men for some ten to twelve minutes?
>
> A. That's right.
>
> Q. You observed the mode of conduct that you have described to us?
>
> A. That's right.
>
> Q. Did you, sir, as a police officer consider that you should investigate it?
>
> A. I did.
>
> * * *
>
> Q. * * * after they left the corner and you observed them again in front of * * * (the store where the three men met) * * * what did you do?
>
> A. I stopped them and went over and talked to them."

As to the exact time when the arrest took place, the record shows:

> "Q. Then in this situation you considered them to be under arrest when you ordered the store people to call for the wagon?
>
> A. That's right."

It is argued on behalf of the petitioners that the case of *Henry vs. United States*, 361 U. S. 98 (1959) establishes the point that the arrest in the instant case took place the moment the defendant was stopped by the detective. However, in the *Henry* case, the government conceded in the lower courts, see 259 F. (2d) 725 (7th Cir. 1958), and adhered to the concession before the Supreme Court, that the "arrest" occurred the moment the car in which Henry was riding was stopped by the federal agents. The Court stated:

"The prosecution conceded below, and adheres to that concession here, that the arrest took place when the federal agents stopped the car. This is our view of the facts of this particular case." 361 U. S. at 103.

When the opinion in *Henry* is read in light of this concession, it is apparent that the Court was only deciding that, in the circumstances of that case, there was no probable cause to justify an "arrest" at the time the car in which Henry was riding was stopped. See, *United States vs. Bonanno*, 180 F. Supp. 71 at p. 85; *Busby vs. United States*, 296 F. 2d 328.

Therefore, the Court of Appeals held in the instant case, that the actual arrest did not occur until the defendant was ordered into the store after the loaded gun was discovered concealed on his person; Cf. *Rios vs. United States*, 364 U. S. 253 (1960).

Section 2935.01 of the Ohio Revised Code defines arrest:

"To deprive a person of his liberty by legal authority. The seizing of a person and detaining him in the custody of the law."

V. In the instant case there was a lawful arrest without a warrant for the commission of a felony and a legal search incident to the arrest; therefore evidence obtained in such search was admissible at the trial.

Since there was a lawful arrest, the sole point remaining concerns the lawfulness of the search and admissibility of the evidence seized. The evidence at issue, in order to be admissible, must be the product of a search incident to a lawful arrest, since the officer had no search warrant. The search most commonly made by law enforcement officers, and the subject of the petitioner's complaint

herein, is that of the person of the accused whom the officer had arrested. Searches of the person must conform to federal constitutional standards. The Fourth Amendment provides in part "* * * that the right of the people to be secure in their person, house, papers and effects against unreasonable searches and seizures shall not be violated * * *."

The vast majority of searches of the person are made incidental to lawful arrest. English and American law has always recognized the right on the part of the government to search the person of the accused when legally arrested. *Weeks vs. U. S.*, 232 U. S. 383, 392 (1914); *Abel vs. U. S.*, 362 U. S. 217 (1960).

The law on this subject has long been so well settled that it is useless to do more than state it whenever the occasion arises. *Lefkowitz vs. U. S. Atty.*, 52 Fed. 2d 52 (1931), affirmed 285 U. S. 452.

The right to search applies to arrests for misdemeanors as well as to those for felonies, *U. S. vs. Schned*, 278 Fed. 650 (1922); *Davis vs. U. S.*, 328 U. S. 582 (1946), assuming an arrest in the full sense of the term.

The legal basis of the right to search is given by law to the arresting officer for three reasons:

(1) To protect the officer against harm;

(2) to deprive the prisoner of potential means of escape; and

(3) to prevent destruction of evidence by the arrested person.

Mr. Justice Frankfurter, dissenting in *U. S. v. Rabinowitz*, 339 U. S. 56 (1950); *Abel v. U. S.*, 362 U. S. 217 at 236.

If the arrest of the person is unlawful, any subsequent search made incidental to arrest is unreasonable. *U. S. v.*

DiRe, 332 U. S. 581 (1948); *Brandon v. U. S.*, 270 F. 2d 311 (1959), Note 5, cert. den. 362 U. S. 943; *Bynus v. U. S.*, 262 U. S. 465; *Williams v. U. S.*, 237 F. 2d 789 (1956).

No matter how valid the arrest may be in a technical sense, if the court finds that it was used by the officers simply as a pretext to make a search of the person, the search is unreasonable. *Taglavore v. U. S.*, 291 F. 2d 262 (1961). "An arrest may not be used as a pretext to search for evidence." *U. S. v. Lefkowitz*, 285 U. S. 452 (1932).

The search of the person, incidental to arrest, should be made by one or more of the arresting officers. *U. S. v. Grieco*, 25 F. R. D. 58 (1960).

The officer's right to make a search of the person incidental to arrest being predicated upon the arrest, the search must follow the arrest, not precede it. *White v. U. S.*, 271 F. 2d 829 (1959); *U. S. v. Hamn*, 163 F. Supp. 4 (1958).

At this point the distinction made by the trial court and the appellate court comes into focus. The foregoing rule in the *White* and *Hamn* cases and the decision in the *Mapp* case will not outlaw a state officer's frisking or even a search of the person made prior to arrest. Under the Uniform Arrest Act, adopted with modifications in Delaware, New Hampshire and Rhode Island, "a peace officer may search for a dangerous weapon any person whom he has stopped or detained to question as provided in Section 2, whenever he has reasonable ground to believe that he is in danger if the person possesses a dangerous weapon. If the officer finds a weapon, he may take and keep it until the completion of the questioning, when he shall either return it or arrest the person." "The Uniform Arrest Act," 28 *Virginia Law Review* 315 at 344 (1942).

The law in the case at bar as pronounced in the opinion of the Ohio Court of Appeals is so well founded that, in a case involving almost identical facts, the Supreme Court of New Jersey has quoted and cited with approval that opinion. *State v. Dilley,* 49 N. J. 460, 231 A. 2d 353. (September 1967.)

The proposition that evidence seized as a result of a lawful arrest followed by a legal search of the person is so axiomatic that it requires no further argument here.

CONCLUSION.

It was stated by Mr. Justice Holmes in "The Common Law and Collected Legal Papers":

> "The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal to do with the syllogism in determining the rules by which men should be governed."

Recognition must be given to the fact that in our changing society conditions and circumstances vary; that logic, experience, necessity, prevailing moral and political theories, public policy and prejudices all reflect and determine the rules under which we as men live. But these are not the only elements to which recognition must be given in formulating such rules.

The realities of our currently changing society require the addition of another ingredient—perhaps the most essential one—*the deadly realism of crime.* We should therefore take note of the experiences of those who have been confronted with this deadly reality to the end that our steps will be toward that road on which the guideposts

will be directed to insuring the safety and welfare of the personnel to whom our own safety and welfare are entrusted.

While this brief is in preparation, October 12, 1967, we are confronted with a classic example of the deadly realism of crime. Through the news media we are informed that an automobile containing four men was involved in several holdups. The state highway patrol received a description of the automobile. The officers pursued a car matching the description and brought it to a halt. A patrolman dismounted from his car to investigate and interrogate the occupants. As he approached their automobile he was met with a bullet. Except for the fact that an item of his equipment (a belt) deflected the bullet, this officer would have been killed. Such experience involving public safety should be far more convincing as to the deadly realism of crime than any logic respondent could present. Experience and necessity, as illustrated by this incident, demonstrate that the right to stop and frisk is essential for the welfare of the officer and the protection of the public. Experience and necessity should of themselves dictate affirmance of the judgment in this case.

Thus we urge that due recognition of safety, experience, necessity and considerations of public policy and the deadly realism of crime merit affirmance of this decision to the end that the maximum safety and security be afforded to those to whom are entrusted the protection of the well-being of society. To those who have beat the drums of fear that the framework of the constitutional safeguards will collapse and we will move several steps forward to a police state if this case is affirmed, we reply in the words of Judge Lewis of the United States Court of Appeals, Tenth Circuit, in *Anspach v. U. S.*, 305 F. 2d 48 (1962):

"But the prevention and detection of crime is not a polite business and we see no need or justification for reading into the fourth amendment a standard of conduct for law enforcement officials which would leave society at the mercy of those dedicated to the destruction of the very freedoms guaranteed by the Constitution. The 'pursuit of happiness' referred to by Justice Brandeis in Olmstead can be destroyed by idealistic theory that shuns the deadly realism of crime."

Even though this case merits affirmance on the basis of any one of the elements that determine the law—changing conditions and circumstances, necessity, moral and political theories, public policy, prejudice, the deadly realism of crime—in the end the decision rests on the sum total of these elements. The affirmance of the law in this case is logically and fundamentally fair when equated with the deadly realism of crime. In the face of this deadly reality, affirmance on the basis of the sum total of these elements results in a benefit to society and is not arbitrary or capricious.

"The judicial approach to the problem, of course, must be in a spirit of cooperation with the police officials in the administration of justice. They are directly charged with the responsibility for the maintenance of law and order and are under the same obligation as the judicial arm to discharge their duties in a manner consistent with the Constitution and statutes. The prevention and punishment of crime is a difficult and dangerous task, for the most part performed by security and prosecuting personnel in a spirit of public service to the community. Only by the maintenance of law and order may the rights of the criminal and the law-abiding elements of the population be protected." Mr. Justice Reed dissenting in *Upshaw v. U. S.*, 335 U. S. 410 (1948).

Thus we conclude our case by urging that if the rules that we as men live under are to stand and to meet the test of the deadly realism of crime, the decision of the Ohio Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1967
No. 67

JOHN W. TERRY, *et al.*,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

BRIEF OF NATIONAL DISTRICT ATTORNEYS' ASSOCIATION, AMICUS CURIAE, IN SUPPORT OF RESPONDENT.

Reasons for Filing an Amicus Curiae Brief.

For the reasons set forth below, the National District Attorneys' Association, with the consent of all counsel in this case (see letters on file with the Clerk of the Court), has filed this brief.

One of the basic issues underlying the instant case, as well as two companion cases, *Sibron v. N.Y.*, No. 63, and *Peters v. N.Y.*, No. 74, is whether the Fourth Amendment prohibits the police practice of temporarily detaining persons in the "field"[1] on any standard[2]

[1]We define the contept of "temporary field detention" in Part I *infra* of our argument.

[2]As is explained in Part I *infra*, we do not urge any particular formula for the constitutional standard upon this Court, but merely that the standard can be less than "probable cause to arrest," which is the standard urged by petitioner Terry. (See Brief for Petitioner, p. 13.)

less than probable cause to arrest. Our concern is with the broad implications of this issue, not with its particular application to any given factual situation. Consequently, what we say herein will have relevance to the two cases arising from New York to the extent that the ultimate disposition of these cases touches upon the basic issue which we discuss herein. We have chosen, however, the instant case as the means for expressing our views because we feel that it permits a broader consideration of the problem than may otherwise be permitted by the New York cases.

After considering whether the Constitution prohibits temporary field detention on a standard less than probable cause to arrest and assuming the Constitution does not, we next consider whether the Fourth Amendment prohibits a protective patdown[3] incidental to such a detention. Then, we consider the admissibility of physical evidence resulting from the protective patdown.[4]

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[3]We define the concept of "protective patdown" in Part I *infra* of our argument.

[4]We limit our consideration to the admissibility of such physical evidence, as distinguished from statements obtained during the temporary detention, because of the factual context in which each of the three cases now pending before this Court has arisen. In each of these three cases the issue is whether or not physical evidence obtained as the result of a patdown was properly admissible at the trial on the issue of guilt or innocence. Collaterally, in determining whether the procedures leading to the patdown and the patdown itself do not run afoul of the Fourth Amendment, it may be necessary to consider whether statements obtained prior to the patdown are admissible in determining the propriety of the conduct in light of the Fourth Amendment. Thus, in the instant case the petitioner, Terry, gave a "mumbled response." 5 Ohio App. 2d 122, 123-24, 214 N.E. 2d 114, 116 (1966). In the *Peters* case the petitioner's response was characterized by the Court of Appeal as "apparent chivalry." 18 N.Y. 2d 238, 241,

The reasons that the National District Attorneys' Association is interested in each of the three issues set forth above is that the procedures termed herein as "temporary field detention" and "protective pat-down", as well as the admissibility of evidence obtained thereby, have received recognition and approved in various states for which members of the Association are counsel[5] and are thus used by counsel in processing criminal cases. Furthermore, as will also be set forth with more particularity in the course of our argument,[6] these procedures have an important bearing upon the proper role of police in our society and thus will affect the legal advice given to police officers by the various prosecuting attorneys who are members of the Association.

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219 N.E. 2d 595, 597, 273 N.Y.S. 2d 217, 219 (1966). While this is an important issue which has Fifth Amendment aspects, it need not be considered herein since it appears that these cases would not be a proper vehicle for deciding such an issue since it has not apparently been raised by the petitioners in any of the three cases, nor was it decided by the state courts below. In any event, if the basic underlying right to conduct a temporary field detention on a standard less than probable cause to arrest is sustained, the right to question would appear to be an integral part of such detention which would not be subject to Fifth Amendment incrimination since this type of detention does not constitute deprivation of freedom of action in a "significant way." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Rather it constitutes "general on-the-scene questioning as to facts surrounding a crime or general questioning of citizens in the fact-finding process" which was "not affected by" the holding of *Miranda*. 384 U.S. at 488.

[5]See discussion in II,A,2, and III *infra* of this brief.

[6]See discussion in II,A,1, II,A,3 and II,B *infra* of this brief.

SUMMARY OF ARGUMENT.

I.

Semantics.

Definition of the terms "temporary field detention" and "protective patdown," as well as indicating the proposed solution to the use of these police investigative devices.

We urge that a constitutional standard for these two investigatory techniques be adopted without specifically setting forth any particular formula for such standard in order that each state may have sufficient flexibility to develop its own semantic definition and conceptual underpining of that standard. This Court would thus play the same role in determining whether that standard has been met, as it does in determining whether or not probable cause for a search warrant or an arrest exists, namely, review of each case to determine whether the standard established by the state and applied to the facts of the case comply with the Constitution.

II.

Temporary Field Detention, Protective Patdown and the Admissibility of Evidence.

Based upon (1) society's need for the investigatory techniques of temporary field detention and protective patdown, (2) upon the acceptance of these techniques by society, (3) upon the recognition that the abuse of power by unscrupulous police officers will not be eliminated or reduced by eradicating these techniques

at the expense of those officers who conscientiously attempt to comply with the Constitution, and (4) upon the interpretations given to the Fourth Amendment by this Court in the past, we contend that evidence obtained by the proper use of these techniques is admissible in a state trial.

III.

California.

The State of California, in a sense, is an experimental laboratory in which the judiciary has been able to impose constitutional standards with respect to these techniques which distinguish lawful police investigatory techniques from abuse of power, while protecting both the individual citizen and society as a whole.

ARGUMENT.

I.

SEMANTICS.

The phrase "temporary field detention" is used herein to mean those situations in which a citizen is stopped by a police officer for investigation in the field while either a pedestrian, or occupant of a vehicle at a time when the officer stopping the citizen does not have probable cause to arrest the citizen.[7] It thus includes the so-called "stop" part of "stop and frisk." We use the phrase "protective patdown" to indicate a cursory running of the officer's hands over the outer garments of a person who is stopped which may lead to a search of what is contained in the garments if the cursory patdown discloses the possible existence of a weapon which could be harmful to the officer. We use this phrase to make clear that we are supporting the use of a cursory search of an individual only in those situations where the facts known to the police officer indicate it is necessary for the protection of the officer and not in those situations where it is used as a subterfuge for an exploratory search.

Much of the literature, both from the commentators and the courts, relating to the problems of temporary field detention and protective patdown involves, in part, semantic analysis.[8] It is quite clear that a distinction

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[7]This brief is not intended to condone or support detentions at a police station "for investigation," where probable cause to arrest did not exist at the time the suspect was taken to the station.

[8]Thus in *State v. Harbatuk*, 95 N.J. Super. 54, 229 A. 2d 820 (1967), the concept of detention was distinguished from arrest; and see Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest*, 51 J. CRIM. L.C. & P.S. 402, 402-03 (1960), for further semanticism.

can be drawn both historically[9] and practically[10] between an arrest and a detention, as well as between a protective patdown and a search. By narrowing the concept of the words "search" or "seizure" as contained in the Fourth Amendment to only arrest and intensive search situations one can completely eliminate the problems posed by the trilogy of cases now pending before the Court. However, we propose to assume, without conceding, that a temporary detention is encompassed by the concept of a seizure (although not within the concept of an arrest) and a frisk is encompassed by the concept of a search within the meaning of the Fourth Amendment.[11] However, this does not mean that the only searches or seizures authorized by the Fourth Amendment are those for which there is probable cause to arrest, or consent or a warrant.[12] Indeed, this assumes the answer to the issue in the same way as does one who says a detention is not an arrest.

An additional area of possible semantic misunderstanding relates to the test which must be met in order for a temporary field detention to be valid, if a standard less than probable cause for an arrest is permissible. This standard has received various semantic ex-

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[9]A probative analysis of the historical distinction between arrest and detention (as well as of other problems inherent in the trilogy of cases before this Court) can be found in Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. CRIM. L.C. & P.S. 393, 406-11 (1963).

[10]While it may be inconvenient for a citizen to be detained, it is certainly less inconvenient than being arrested and taken to jail.

[11]This appears to be the basis for the discussion of the constitutional right to detain in Leagre, *supra* note 9.

[12]This is discussed in our brief in II,A,4 *infra* and in Leagre, *supra* note 9.

planations, such as "reasonably suspects,"[13] "reasonable ground to suspect,"[14] et cetera, all of which, however, are based upon the same premise, namely, that some standard less than probable cause to arrest is acceptable. We propose not to define this standard in this brief since it may differ semantically from state to state. Rather, we shall use the phrases "constitutional standard for temporary field detention" and "constitutional standard for protective patdown" (or similar conceptionalization) in the belief that each state should be free to adopt whatever terminology it desires as well as the conceptual bases underlying this terminology so long as such terminology and the underlying concepts when applied to a particular factual situation, are consistent with the standard required by the Constitution.

Thus it is our hope that this Court will recognize the existence of a constitutional standard for temporary field detention (which is less than probable cause to arrest) and for protective patdown, and will not preclude the states "from developing workable rules governing"[15] temporary field detention and protective patdown "to meet 'the practical demands of effective criminal investigation and law enforcement' in the States."[16] Thus this Court would overturn only those cases in which a particular temporary field detention or protective patdown was unconstitutional.

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[13]N.Y. CODE CRIM. PROC. § 180-a (McKinney Supp. 1966).
[14]UNIFORM ARREST ACT § 2.
[15]*Ker v. California*, 374 U.S. 23, 34 (1963).
[16]*Ibid.*

II.

GRANTING THE POLICE THE RIGHT OF TEMPORARY FIELD DETENTION AND PROTECTIVE PATDOWN ON A STANDARD LESS THAN PROBABLE CAUSE TO ARREST IS THE ONLY EFFECTIVE WAY TO MEET "THE CHALLENGE OF CRIME IN A FREE SOCIETY."[17]

A. Temporary Field Detention.

1. The Role of Temporary Field Detention in the Prevention and Investigation of Crime.

The three cases now pending before this Court are demonstrative evidence of the role of temporary field detention in meeting the challenge of crime by preventing the commission of serious criminal activity. Thus, in the instant cases it is reasonable to infer that petitioner Terry was prevented from engaging in an armed robbery, petitioner Sibron was prevented from engaging in housebreaking, and petitioner Peters was prevented from engaging in the sale of narcotics. This is undoubtedly an important task for the police to perform.[18] Indeed, the need for the prevention of crime, in addition to the apprehension of criminals who have already committed crimes, is evident from the fear for

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[17] Title of the 1967 report submitted by the President's Commission on Law Enforcement and Administration of Justice.

[18] "It is better to have an alert police force that prevents the crime than one that devotes its time to seeking to identify the assailant after the life has been taken, the daughter ravished, or the pedestrian slugged and robbed." Wilson, *Police Arrest Privileges in a Free Society: A Plea for Modernization*, 51 J. CRIM. L.C. & P.S. 395, 398 (1960).

personal safety felt by citizens regarding walking alone in their neighborhood after dark.[19]

An additional important aspect of the role of temporary field detention which is not apparent from the facts of the instant cases is the use of such detentions for apprehending persons who have already committed crimes, independent of those discovered during the detention.[20]

The use of this method by the police is widespread and has been found by them to be effective both in preventing and investigating crime.[21] As noted in the

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[19]See NATIONAL OPINION RESEARCH CENTER, REPORT TO THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *Criminal Victimization in the United States: A Report of a National Survey* (hereinafter referred to as *Field Surveys II*) 72-74 (1967).

[20]See, *e.g.*, *Bell v. United States*, 280 F. 2d 717 (D.C. Cir. 1960) where officers, hearing screams for help at 4:30 a.m. and seeing defendant running near the point from which the screams had come, detained defendant for purposes of checking on the distress call. Had the officers not stopped him, his identity might never have been known and subsequent apprehension entirely frustrated thereby. See also *Wilson v. State*, ... Miss. ...., 186 So. 2d 208 (1966), in which a highway patrol officer, having received a radio call to be on the lookout for a light-colored Plymouth station wagon in connection with a burglary, observed one parked outside a restaurant and requested the occupants to wait a few minutes in order to speak with a sheriff's deputy who was investigating the case. The deputy, arriving shortly thereafter, found sufficient evidence to constitute probable cause for arrest. Again, it is possible, if not likely, that without the detention ultimate apprehension of the perpetrators would not have occurred.

Indeed, of the 23 cases in the appendix to this brief, only 5 are *not* of this type. These 5 are *Shipley v. State*, 243 Md. 262, 220 A. 2d 585 (1966), *People v. Peters*, 18 N.Y. 2d 238, 273 N.Y.S. 2d 217, 219 N.E. 2d 595 (1966), *State v. Terry*, 5 Ohio App. 2d 22, 214 N.E. 2d 114 (1966), *Kavanagh v. Stenhouse*, 93 R.I. 252, 174 A. 2d 560 (1961), *Wilson v. Porter*, 361 F. 2d 412 (9th Cir. 1966).

[21]See MICHIGAN STATE UNIVERSITY, REPORT TO THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *A National Survey of Police and Community*

Task Force Report: The Police, prepared by the President's Commission on Law Enforcement and Administration of Justice:

> "The police consider field interrogations to be an important method of preventing and investigating crime, since they rarely encounter a crime in progress. Normally, by the time a police officer has

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Relations (hereinafter referred to as *Field Surveys V*) 327-31, 333 (1966). See also La Fave, *Detention for Investigation by the Police: An Analysis of Current Practices,* WASH. U. L.Q. (1962) 331, wherein it is stated at 336:

> "This practice, referred to by the police as 'field interrogation,' may be accompanied by a frisk of the suspect when the officer deems it necessary for his own protection. Reports are often made of these field interrogations, which may later prove most useful; for example, if a burglary is later reported in the area where the suspicious person was found, the police then have a particular suspect who can be investigated further."

Thus, for example, we are informed by the Los Angeles Police Department that it recently inaugurated a system which computerized field detention interrogation cards made out after a person in a vehicle has been stopped for field interrogation or arrested. Solely on the basis of leads obtained from the computerized field identification cards for such vehicle stops, 175 felony crimes, involving 67 persons who were not arrested at the time of the field interrogation, were solved and led to the filing of felony complaints against 48 of these defendants (in some instances felony charges were not filed because, for example, the defendant was already involved in other criminal charges or the victim refused to prosecute). The solution of these crimes resulted from the utilization of field interrogation cards from four divisions of the Los Angeles Police Department during the period January 1, 1967, to November 1, 1967. Because of the success of this program it is now being expanded to include all 16 divisions of the Los Angeles Police Department. However, for purposes of meaningful statistics, it is impossible to determine how many field interrogation cards were filled out in situations where the police did not have probable cause to arrest at the time of the initial stopping since such cards are made out on any "good suspect," irrespective of whether probable cause for his arrest existed at the time of his initial stopping. It is clear, however, that as to these 67 defendants such probable cause did not exist since they were never arrested at the time of their initial detention. Unfortunately, the work of the Los-

(This footnote is continued on the next page)

arrived at a crime scene, the perpetrator has fled, people have gathered, and confusion has ensued. Further, the police believe that they can prevent much crime if they are permitted to stop and question persons whose behavior strongly suggests that a criminal act is being contemplated." (pp. 183-84.)

Although the need for some investigation as to the usefulness of this procedure was recognized in one of the studies underlying the *Task Force Report* on the police,[22] unfortunately no such study was ever conducted nor have we been able to find any probative inquiry with respect to the actual amount of crime either prevented or solved as the result of the temporary field detention technique. However, the mere fact that statistical analysis is not available which would indicate the exact percentage or quantity of crime prevented or solved does not mean that the need for temporary field detentions is based on mere speculation. (See the second paragraph of footnote 21, *supra,* for evidence of the usefulness of field interrogation in solving crime

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Angeles Police Department has not been geared for statistical purposes to ascertain the percentage or number of persons who are stopped in situations wherein probable cause to arrest does not exist, but who are eventually arrested upon the basis of probable cause developed during the course of the temporary field detention or developed later on the basis of leads derived solely from that detention.

[22]See *Field Surveys V, supra* note 21, wherein it is stated at 336:

"Second, because of the critical nature of the field interview contact, would it not seem consistent to evaluate the practice in terms of the usefulness of the information gained? Does it really, as speculated, enable an investigator to place an occurrence or individual in a time-place context for the purpose of successfully conducting inquiry? No evaluation of this type seems to have been available! It should be given some thought."

which, however, cannot be transformed into any statistical percentage.)

First, the experience of the police has indicated to them that it is a necessary technique and this certainly should have some weight in determining whether or not it is required in society, albeit police perception of this need may not be subject to the same critical analyses which underlie some of the surveys prepared for the President's Commission on Law Enforcement and Administration of Justice.

Second, as will be set forth in the succeeding portion of this argument, even those outside of law enforcement who have considered and studied the need for this technique have concluded that such technique is required in society.[23] The existence of overwhelming, unanimous judicial and legislative authority in support of this practice in 17 state jurisdictions and 7 circuits of the Courts of Appeals is the type of evidence which has previously been deemed "pragmatic evidence of a sort"[24] in situations where "it cannot positively be demonstrated that enforcement of the criminal law is either more or less effective under either rule [the exclusionary rule]."[25]

Third, we submit that it would be extremely reckless to strike down this technique *merely* on the assumption that, because its quantitative usefulness has not been determined with exactitude, it is not a technique worth saving for society. If this assumption proved later to be wrong, the results could be disas-

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[23]See II,A,2 *infra*.

[24]*Elkins v. United States*, 364 U.S. 206, 218 (1960), wherein this Court considered the experience of both federal and state courts in applying the exclusionary rule.

[25]*Ibid.*

trous in regard to society's ability to meet the challenge of crime. We suggest, therefore, that a more appropriate way of approaching this problem is to accept the role of this technique in our society until such time as its usefulness has been adequately disproved and to determine whether its role in society can be sustained without infringing upon constitutional protections afforded to citizens by the Fourth Amendment.

Before concluding our discussion of ohe importance of temporary field detention to society in its struggle against crime, we wish to point out a basic distinction between the recognition of this interest in deciding questions relating to the Fourth Amendment and those relating to the Fifth Amendment. We are aware that in *Miranda v. Arizona,* this Court indicated that the need for a police technique cannot be weighed against the privilege afforded by the Fifth Amendment because that privilege is absolute.[26] The Fourth Amendment, however, by its very terminology, makes it clear that it is not absolute since it uses the word "unreasonable," thereby recognizing that some searches and seizures are reasonable. Thus in construing the scope of the Fourth Amendment this Court must apply a balancing test.

To describe conduct as "unreasonable" is a value judgment, not a statement of objective fact.[27] Once

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[26]384 U.S. 436, 479-80 (1966).

[27]In *Rabinowitz v. United States,* 339 U.S. 56 (1950), the Court states:

> "What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are 'unreasonable' searches and, regrettably, in our discipline we have no ready litmus-paper test. The recurring questions of the reaonableness of searches must find resolution in the facts and circumstances of each case." 339 U.S. at 63.

a search or seizure is deemed to be unreasonable under the Fourth Amendment, certainly the interests of law enforcement can never justify violation of that guarantee. However, in judging whether a particular search or seizure is reasonable, the interest of society in effective law enforcement must be weighed against other interests, such as privacy and the desire to continue on one's way. Indeed, this Court, in interpreting the Fourth Amendment, has given recognition to the needs of law enforcement.

As this Court stated in *Elkins v. United States*:[28]

> "It must always be remembered that what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures. . . . [I]t can fairly be said that in applying the Fourth Amendment this Court has seldom shown itself unaware of the practical demands of effective criminal investigation and law enforcement."[29]

2. The Use of Temporary Field Detention Has Received Overwhelming Support From Society.

Almost without dissent every judicial body that has considered the question of whether or not it is constitutionally permissible for the police to engage in the practice of temporary field detention has upheld this practice. We have set forth in an appendix to this brief the 16 states and 7 federal circuit courts of appeals in which appellate courts have considered and upheld this practice. We have listed for each jurisdiction one recent leading case, even though there may be additional cases supporting this practice from each jurisdiction. Additionally, if a statute has been enacted in a ju-

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[28] 364 U.S. 206 (1960).

[29] *Id.* at 222.

risdiction, we have included the citation to the enactment. In addition to the 16 states which have upheld this practice by judicial decision, one jurisdiction has a statute authorizing the practice but there appears to be no case interpreting the constitutionality of the statute. We have found no jurisdiction which has struck down the practice of temporary field detention. In short, judicial support for the retention of this practice is unanimous in this country.

The two national bodies which have most recently engaged in studies in this field have concluded that the practice of temporary field detention should be retained in our society. Thus, the American Law Institute recommends the enactment of legislation recognizing the lawfulness and necessity of this practice.[30] The President's Commission on Law Enforcement and Administration of Justice recommends the continuation of this practice as follows:

> "If the police were forbidden to stop persons at the scene of a crime, or in situations that strongly suggest criminality, investigative leads could be lost as persons disappeared into the massive impersonality of an urban environment. Yet police practice must distinguish carefully between legitimate field interrogations and indiscriminate detention and street searches of persons and vehicles.
>
> *"The Commission recommends:*
>
> State legislatures should enact statutory provisions with respect to the authority of law enforcement officers to stop persons for brief question-

[30]See ALI CODE OF PREARRANGEMENT PROCEDURE § 2.02 (Tent. Draft No. 1, 1966).

ing, including specifications of the circumstances and limitations under which stops are permissible.

"Such authority would cover situations in which, because of the limited knowledge of a policeman just arriving at the scene, there is not sufficient basis for arrest. Specific limitations on the circumstances of a stop, the length of the questioning, and the grounds for a frisk would prevent the kind of misuse of field interrogation that, the Commission study also indicated, occurs today in a substantial number of street incidents in some cities."[31]

Finally, it should be noted that while empirical data underlying the Commission's study appears to be rather limited and the circumstances under which the data was collected may be open to some close scrutiny, it appears that an overwhelming majority of citizens interviewed did favor at least the right to stop a person and ask his name and address when he is anywhere outside his home.[32] Of course, we recognize that a

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[31]THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 95 (1967). See also THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 183-85 (1967), wherein it is stated at 184: "The Commission believes that there is a definite need to authorize the police to stop suspects and possible witnesses of major crimes, to detain them for brief questioning if they will not voluntarily cooperate, and to search such suspects for dangerous weapons when such a precaution is necessary."

[32]See THE UNIVERSITY OF MICHIGAN, REPORT TO THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *1 Studies in Crime and Law Enforcement in Major Metropolitan Areas*, Section II (hereinafter referred to as *1 Field Surveys III*, Section II) 88 (1967), which indicates that 79% of the residents interviewed would give the police this right, independent of whether or not the officer believed the person stopped had actually committed a crime.

substantial portion[33] of the citizens that would permit such stopping and questioning indicated that this right would depend on the circumstances.

Perhaps the answer most representative of our society, including the court decisions and national bodies referred to above, would be the following statement, given as a representative comment from personal interview data regarding the practice of temporary field detention:

> "'. . . practice is o.k., but the way it was carried out was unfriendly, abusive, etc. Not against method, but how it is used.' "[34]

3. An Absolute Prohibition Upon Temporary Field Detention Will Only Penalize Law Enforcement Officers Who Are Conscientiously Attempting to Comply With the Law, While at the Same Time Affording No Substantial Benefits to Those Whose Rights May Presently Be Violated.

It is apparent that while the judiciary, the various national bodies that have recently studied this problem and the citizenry interviewed support the practice of temporary field detention, it is a practice which is susceptible to abuse. We do not condone or in any way lend our support to the misuse of this practice. What we do urge is that this practice should receive judicial recognition by this Court to the extent that it is not abused. We proceed now to discuss why entire elimination of the practice will not eliminate the abuse to which it is presently susceptible.

While there may be some police officers who abuse their right to utilize temporary field detention, others

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[33] *Ibid.* (The figure given is 23%.)

[34] See *Field Surveys V, supra* note 21, at 334.

have conscientiously attempted to comply with the law and, because of such compliance, are not creating any resentment within the environment in which they operate. The most graphic example of the possible extremes to which the practice of temporary field detention can be pursued is evident from *Field Surveys IV* of the study underlying the *Report to the President's Commission on Law Enforcement and Administration of Justice*. That study indicated that whereas in San Diego field interrogation was a primary target of citizen complaint, in Philadelphia it was not a focal point of such cricitism.[35]

The following is the explanation given in the survey for the lack of controversy regarding this practice in Philadelphia:

> "As commented on above, the field interrogation procedure has provided little cause for controversy in Philadelphia. This may be due to a rational use of the tactic without compulsory overtones, such as official or unofficial 'quotas'. Its apparent acceptance may also partly be due to the fact that it may not be noticed as much in a large, sprawling eastern city as it is in a smaller, more compact western municipality. Another reason the public may not object to field interrogations is that the Philadelphia Police Department has demonstrated that it is not a tool designed exclusively to oppress minority group members."[36]

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[35] THE UNIVERSITY OF CALIFORNIA AT BERKELEY, REPORT TO THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *2 The Police and the Community*, (hereinafter referred to as *2 Field Surveys IV*) 170 (1966).

[36] *Id.* at 173.

If the right to engage in temporary field detention is judged unreasonable because it may be abused, there would be no police procedure which could not be judged unreasonable upon the same ground. Indeed if possibility of abuse is justification for holding unconstitutional a police practice based upon the exercise of judgment by a police officer, *Mapp v. Ohio*[37] did not reach the problem it was designed to solve, namely, unlawful searches and seizures. Such unlawful conduct is still present in our society, as is evident from the reported cases.[38] To carry the "logic of possible abuse" to its rational conclusion, should arrests only be permitted if based upon warrants of arrest because some arrests presently are being made by police officers who exercise their judgment based on facts which the courts sometimes find do not constitute probable cause for the arrests? We submit that if the exclusion of evidence obtained as an incident of an unlawful arrest is a sufficient deterrent to unlawful arrests,[39] why should not the exclusion of evidence obtained as an incident of a temporary field detention which does not meet the constitutional standard for such detention also be a sufficient deterrent to its abuse?

Thus, if the practice of temporary field detention is judicially limited to its reasonable exercise, all that this Court will have done is to legalize its proper use, not its abuse. Indeed, to prohibit it entirely because

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[37] 367 U.S. 643 (1961).

[38] See, *e.g.*, *Stoner v. California*, 376 U.S. 483 (1964).

[39] "Only last year the Court itself recognized that the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' *Elkins v. United States, supra*, at 217." *Mapp v. Ohio*, 367 U.S. 643, 656 (1961).

of its abuse while failing to give recognition to its proper use "is to burn the house to roast the pig."[40]

Furthermore, prohibiting this practice entirely will not alleviate the present abuse to which it is susceptible. Studies indicate that there are already in existence a number of police practices which could very readily take the place of the abuse of temporary field detention. Thus, instead of merely detaining a person in the field for investigation, he could be brought down to the station and arrested "for investigation"[41] or he could be arrested on some charge not directly related to that which the police officer is investigating.[42]

As noted by one commentator:

> "Pressure may be placed on the police to make arrests too early in the investigative process."[43]

This Court recently attempted to alleviate such pressure in another aspect of search and seizure when it stated:[44]

> "The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon,

[40] *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

[41] See *Field Survey V*, *supra* note 21, at 336 wherein it is stated:

> "Although arresting an individual for investigative purposes, even on the basis of a specific suspected offense, is patently questionable, the practice is nevertheless widespread and fairly common."

[42] PERKINS, ELEMENTS OF POLICE SCIENCE 297 (1942). See, Note, *Philadelphia Police Practices and the Law of Arrest*, 100 U.PA.L.REV. 1182, 1205 (1952), regarding the "vagrancy dodge."

[43] Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, SUP. CT. REV. (1960) 46, 65-66.

[44] *Hoffa v. United States*, 385 U.S. 293, 310 (1966).

and a violation of the Sixth Amendment if they wait too long."[45]

In short, we submit that present interpretations of constitutional magnitude have not necessarily eliminated unlawful police practices. The officer who would harass and abuse is doing so now; the conscientious officer is not. If a police officer wants to roust someone, he will continue to do so irrespective of whether the practice of temporary police detention is judicially prohibited. The officer who would engage in abuse can justify his activities under present law and even support them with perjured testimony where necessary. Thus, granting the conscientious officer this additional alternative will not increase the excesses of the officer who is already abusing the powers of his office.

Should temporary field detention be upehld by this Court, the judicial review of its exercise will serve to educate the police as to the propriety of their conduct in the field, a function of undoubted importance insofar as those police officers who attempt to conscientiously obey the Constitution are concerned. On the other hand, total prohibition of temporary field detention would remove the opportunity for courts to define circumstances which constitute an abuse of this practice, affording the conscientious officer no guidance whatsoever as to what he should do in the proper prevention and investigation of crime in the field, while in no way restraining those officers who would abuse their office irrespective of constitutional protections.

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[45]To fail to alleviate the pressure to arrest surrounding circumstances which warrant investigation, but which are short of probable cause to arrest, can only further immortalize a line from Gilbert and Sullivan: "A policeman's lot is not a happy one." *Pirates of Penzance, Act II* (Sergeant of Police).

Furthermore, we submit that just as elimination of this practice will not aid those whose rights are truly abused in the field, it will not aid them in their attempts to obtain recourse from the courts for such abuse. As recently stated by one of the commentators:

> "Pressure may be placed on the courts to water down the standards for probable cause to make formal arrests in order to avoid freeing obviously guilty defendants because of relatively minor invasions of their privacy."[46]

Indeed, this Court recently had occasion to note a similar "watering down" experience relating to the admissibility of mere evidence. As noted in *Warden v. Hayden*,[47] the various courts of appeals, being bound by the rule of *Gouled v. United States*, 255 U.S. 298 (1921), had been compelled to stretch the concepts of instrumentalities of a crime or means used to commit a crime in order to include the recovery of physical evidence which might otherwise have been classified as mere evidence.[48] We would hope that similar confusion would not result in the law relating to probable cause for an arrest because of a failure by this Court to recognize the need for temporary field detention.

4. Temporary Field Detention Is Constitutional Without Probable Cause to Arrest.

Probable cause to arrest is often deemed to have some magic quality of clairvoyance.[49] We submit

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[46]Barrett, *supra* note 43, at 66.

[47]387 U.S. 294 (1967).

[48]*Id.* at 309: "Pressure against the rule in the federal courts has taken the form rather of broadening the categories of evidence subject to seizure, thereby creating considerable confusion in the law."

[49]See Foote, *supra* note 8, at 406-07. In this article Foote

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that merely stating that the proper test is probable cause does not, *ipso facto,* create a formula which can intuitively be applied to the facts of a particular case. We submit that the establishment of concepts underlying a standard less than probable cause is no more difficult than the establishment of the concepts underlying probable cause itself. Indeed we should hope that difficulties in conceptualizing a standard would not lead to judicial abnegation of this Court's clear duty.

Recently a commentator undertook just this task of analytically probing the conceptualization which would be involved in establishing a standard for temporary field detention as well as setting forth the constitutional validity of such standard.[50] After undertaking this task, the author concludes as follows:

> "The thesis of this paper is that a more flexible compromise than today exists between the right of privacy and legitimate police desires can be reached within the framework of the Fourth Amendment. The standard of 'probable cause' does not seem to have satisfactorily done its job. The result has been a hodgepodge of 'vagrancy' statutes which often do little more than to make 'being suspicious' a crime and widespread evasion of the law. It would be far better to face the issue squarely and set up a system of intelligent safeguards which protect the security of the individual and, at the

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rails against the claimed ambiguity of standards less than probable cause to arrest, as if the concept of probable cause is so clear to every Justice of this Court that it would never have caused controversy within the Court in past cases.

[50]See Leagre, *supra* note 9.

same time, do not unduly restrict the police in the performance of their duties.

"Conceptually, this flexibility can be justified within the Fourth Amendment by the detention-arrest distinction and a reliance upon the broad provision contained in the Amendment's first clause. A test of reasonableness under all the circumstances may be the only solution to the present problem which can honestly be said to fulfill the policy of the constitutional provision.

"The sole objection to such a test must necessarily lie in its vagueness. Doubtless, this would present some difficulty in initial application. Yet there is no reason to suspect that the Court would be incapable of eliciting fundamental standards through a process of judicial inclusion and exclusion. Thus it would seem difficult to conclude that the vice of vagueness is a sufficient reason for discarding a formulation of reasonableness under all the circumstances; a certain amount of such vagueness is rather of the essence of a constitutional principle."[51]

A similar innovation in the law of search and seizure has been taken by this Court with respect to the concept of probable cause itself. For example, in *Camara v. Municipal Court*,[52] this Court tempered probable cause for a search warrant with reasonableness by holding that "reasonableness is still the ultimate standard."[53] This seems to clearly compel the conclusion that the controlling concept in the Fourth Amendment

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[51] *Id.* at 419-20.

[52] 387 U.S. 523 (1967).

[53] *Id.* at 539.

is the standard of reasonableness and not the standard of probable cause alone, since the Fourth Amendment's requirement of probable cause for search warrants is on its face an absolute requirement and could conceivably have been interpreted without the applicability of the concept of reasonableness which is found in a separate clause of that amendment.[54]

As a final note to the question of whether or not such an investigative practice as temporary field detention is constitutional, we would recall the words of this Court in *Miranda v. Arizona*,[55] which were as follows:

> "General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement."[56]

These words would be hollow indeed if all they meant was that while the Fifth Amendment does not prohibit temporary field detention, the Fourth Amendment does.

B. A Constitutional Standard for a Protective Patdown Should Be Upheld.

If, as we urge, this Court adopts a constitutional standard authorizing the practice of temporary field detention, it would be "cruel and unusual punishment" to permit the former practice without the necessary protection of a protective patdown. In a day and age where attacks are being made upon the right of society

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[54]See the discussion of the relationship of the two clauses in Leagre, *supra* note 9, at 396-03.

[55]384 U.S. 436 (1966).

[56]*Id.* at 477-78.

to lawfully impose the death penalty on the ground that its imposition is "cruel and unusual punishment,"[57] we should hope that the advocates of the abolition of the death penalty would have as much concern for those who enforce society's law as they do for those who enforce the law of the jungle. Recent statistics indicate that the concern of police officers for their own safety is not phantasmagoric.[58] The report of the President's Commission discloses that 20% of the persons upon whom police officers used a protective patdown were carrying either guns or knives.[59] We doubt that one out of every five citizens in this country is carrying a similar deadly weapon and thus we submit it is reasonable for the police to single out for protective patdown that category of persons whom they stop pursuant to a constitutional standard for temporary field interrogation.

We recognize that the protective patdown, albeit initially an attempt to protect the life of the officer, may culminate in a criminal charge solely based upon physical evidence which was discovered as a result of that

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[57]See, *e.g.*, *Hill v. Nelson*, 271 F. Supp. 439 (N.D. Cal. 1967).

[58]The Uniform Crime Reports for 1966 released by the Federal Bureau of Investigation in a publication entitled, *Crime in the United States*, discloses at pages 45-46 that during the years 1960-1966, 41 police officers were killed while "investigating suspicious persons and circumstances." This number of police officers constitutes 12% of all the officers killed by felons during this period of time. In accord with the recent rising trend of crime, the number of police officers killed in 1966 "by persons whom the officers had stopped for investigation or interrogation because of suspicion regarding their actions" was 18% of the total officers killed in 1966 (57 law enforcement officers). FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 45-46 (1967).

[59]See THE CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 31, at 94-95.

patdown. This is true in the trilogy of cases now pending before this Court. It should be noted, however, that this is by no means as common as this trilogy of cases would indicate.[60] The right to engage in a protective patdown should obviously extend no further than the purpose for which it was conducted. Thus we would require a constitutional standard to be established for the protective patdown which would be reasonably related to the purpose of that patdown. We do not condone an intensive search which evidences a desire to explore hidden places for the purpose of finding evidence other than a weapon which may be dangerous to the safety of the officer. The factual situation underlying each case will determine whether or not this constitutional standard underlying a protective patdown has been met.[61]

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[60]The representative recent leading cases set forth in our appendix disclose that of the 23 cases, in only 4 cases (including 2 of the cases now before this Court) was physical evidence introduced which had been found during the course of a protective patdown of the defendant's person. These cases are *People v. Peters*, 18 N.Y. 2d 238, 273 N.Y.S. 2d 217, 219 N.E. 2d 595 (1966); *State v. Terry*, 5 Ohio App. 2d 22, 214 N.E. 2d 114 (1966); *Commonwealth v. Hicks*, 209 Pa. Super. 1, 223 A. 2d 873 (1966); *Wilson v. Porter*, 361 F. 2d 412 (9th Cir. 1966).

[61]In *State v. Terry*, 5 Ohio App. 2d 122, 214 N.E. 2d 114 (1966), the following was stated:

> "However, we must be careful to distinguish that the 'frisk' authorized herein includes only a 'frisk' for a dangerous weapon. It by no means authorizes a search for contraband, evidentiary material, or anything else in the absence of reasonable grounds to arrest. Such a search is controlled by the requirements of the Fourth Amendment, and probable cause is essential. White v. United States (1959), 106 U.S. App. D.C. 246, 271 F. 2d 829. Therefore, we hold that, on the facts presented in the instant case, the 'frisk' for dangerous weapons was valid as an incident to a valid inquiry by the police. Each case must be decided upon its own facts." 5 Ohio App. 2d at 130, 214 N.E. 2d at 120.

C. Evidence Recovered as the Result of a Protective Patdown Which Meets the Necessary Constitutional Standards Should Be Admissible.

In order to place the issue of admissibility of evidence recovered as the result of a protective patdown in its proper perspective, it must be remembered that we urge a constitutional standard for such a protective patdown which will not automatically authorize a protective patdown during every temporary field detention. The reasoning underlying the nonadmissibility of such evidence appears to be that by making inadmissible all evidence recovered, whether lawfully or unlawfully, some pressure to engage in protective patdowns which do not meet constitutional standards will have been alleviated. Such argument, although perhaps superficially appealing, is patently fallacious.

At the present time police officers who are conscientiously attempting to perform their duty (such as is apparently the case in Philadelphia, as noted above)[62] will engage in a protective patdown only when it is necessary for their own protection, and not as a subterfuge for a general exploratory search. If this Court, however, indicates to the police that it makes no difference whether or not the protective patdown meets constitutional standards insofar as the admissibility of evidence is concerned, what would deter any policeman from always engaging in a protective patdown, even if it does not meet constitutional standards? This Court, if it holds that police may engage in protective patdowns which meet a constitutional standard but that the evidence recovered thereby is inadmissible, instead of prohibiting the abuse of this practice will have placed

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[62]See II,A,3 *supra.*

a premium upon its use in all situations. In short, if this Court hold that protective patdowns which meet a constitutional standard are to be recognized, it must necessarily follow that the evidence recovered thereby must also be admissible if an irrational dichotomy leading to police abuse is not to follow.

Additionally, it should be noted that although the trilogy of cases presently pending before this Court all involve evidence recovered during a protective patdown, a substantial amount, if not the majority of evidence discovered during a temporary field detention, is obtained by methods solely unrelated to a protective patdown.[63] Unless this Court were to rule that all evidence obtained during a temporary field detention is inadmissible, we submit that there is no logical nor practical basis for distinguishing between the methods whereby evidence is recovered during that detention so long as the methods meet constitutional standards. Thus, if during a temporary field detention which meets constitutional standards, an officer visually observes narcotics which have been thrown away by the suspect or known stolen property in a vehicle containing the suspect, what justification can there be for admitting this type of evidence and not admitting that which is obtained by a protective patdown conducted in a constitutional manner? On the other hand, if this Court were to hold that no evidence whatsoever which is recovered during a temporary field detention is admissible, the underlying purpose of the detention, namely, to investigate possible criminal conduct, will have been defeated. The form of temporary field detention will exist but not its substance (except for verbal state-

[63]See note 60 *supra*.

ments made by a defendant, an issue which is not discussed herein).[64]

Finally, it should be noted that in those situations where evidence is recovered during the protective patdown, in an overwhelming majority of cases it constitutes the very item for which the officer was seeking, namely, a dangerous weapon.[65] Thus, the admission of such weapons as evidence is merely consistent with the purpose underlying the protective patdown.[66] Indeed, in an age where society has shown a concern for the availability of dangerous weapons,[67] one would question judicial policy prohibiting the admissibility of such evidence if discovered during a protective patdown comporting to constitutional standards.

III.

CALIFORNIA HAS ESTABLISHED WORKABLE CONSTITUTIONAL STANDARDS FOR TEMPORARY FIELD DETENTION AND PROTECTIVE PATDOWN.

We have pointed out previously that the concept of probable cause is not an absolute standard capable of intuitive perception. It is a judgment which is inherently flexible while at the same time permitting constitu-

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[64]See note 4 *supra*.

[65]See *2 Field Surveys III*, Section I, *supra* note 32, at 87 (the designation "personal searches" at page 87 is deemed to be the equivalent of a protective patdown).

[66]The amount of non-dangerous weapons discovered in a search is insignificant. *Ibid.* This would seem to indicate that this procedure is not a very fruitful subterfuge if one assumes it is being used as a subterfuge.

[67]See S.1, 90th Cong., 1st Sess. (1967), presently before Congress (the so-called "Dodd Firearms Bill"); See also THE CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 31, Chapter 10: Control of Firearms.

tional judgment. Similarly, we contend that constitutional standards for temporary field detention and protective patdown can be established which would produce distinctions of constitutional magnitude and which need not be cloaks covering conduct violative of human dignity.

The use of a constitutional standard less than probable cause to arrest does not require that temporary field detentions and protective patdowns be conducted on police hunches, uncontrollable by judicial scrutiny. Just as the courts are able to distinguish those facts which constitute probable cause for an arrest from those which do not constitute such probable cause, so we are confident they can distinguish those facts which meet a constitutional standard for temporary field detention and protective patdown from those which do not. In this regard there may be cases in which the courts have erred in applying this distinction, as well as some jurisdictions where the courts may have completely failed to draw such distinctions. Such judicial error should not be reason for complete abnegation of judicial power with respect to this important issue.

Of all the jurisdictions which have upheld temporary field detention and protective patdown on a standard less than probable cause to arrest, the appellate courts of the State of California have undoubtedly had the most opportunity to develop and apply constitutional standards capable of distinguishing proper and improper police practices in this area. This is true in part because of the judicial recognition of this conduct for a number of years, as well as the large number of decisions which have arisen litigating the concepts under-

lying the system. Thus we have chosen California as a model jurisdiction[68] for the purpose of convincing this Court that the judiciary are capable of applying constitutional standards less than probable cause to arrest which can distinguish those practices which are proper and those which are improper.[69] We thus propose to undertake the task requested by a recent commentator:

> "If probable cause is no longer to be the test, at least at the initial point of arrest, where is the line to be drawn short of indiscriminate police detentions on hunch? No greater service could be rendered to advocates of change in the law than the formulation of specific standards illuminating the limits of the proposed buffer zone which would lie between arrest on probable cause and the protection of the individual from intrusion based on nothing more substantial than a policeman's hunch."[70]

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[68]As in other states, there may be decisions in California which have been erroneously decided on their facts or which fail to draw necessary constitutional distinctions with respect to temporary field detention and protective patdown. This does not mean, however, that the California courts do not have the necessary tools to apply this system properly or that on other occasions it has not been applied properly by the California courts. Similar mistakes by California with respect to search and seizure in other areas (see, *e.g., Stoner v. California*, 376 U.S. 483 (1964), and *Cooper v. California*, 386 U.S. 58 (1967)) have not tarnished the renowned reputation and standing of the California courts, especially the California Supreme Court.

[69]Similar consideration of California occurred in *McCray v. Illinois*, 386 U.S. 300 (1967), in which an *amicus curiae* brief, deemed by this court to be "helpful," discussed the experience of California. 386 U.S. at 306, n.7.

[70]Foote, *supra* note 8, at 407.

A. When Can a California Citizen Be Subjected to a Temporary Field Detention?

The test established by the California Supreme Court for temporary field detention is as follows:

> "It is well established that a police officer in the discharge of his duties may detain and question a person when the circumstances are such that would indicate to a reasonable man in a like position that such a course is necessary to proper discharge of those duties."[71]

Lest it be thought that such a test is so imprecise as to permit blanket authorization for police conduct based on "hunches," one need only consider the facts and holding of the case in which this rule was announced. In *People v. One 1960 Cadillac Coupe*[72] a private citizen found in a public place a kit containing apparatus used in administering narcotics and reported this to the police. During an investigation of this discovery, a police officer saw defendant drive through an adjacent area in a 1960 Cadillac. The officer felt defendant was out of place in the Cadillac and thus watched him closely. Defendant acted nervous and watched the officer in the rear view mirror. He drove out of the alley and parked immediately across the sidewalk from where the kit had been found. He left the car and walked over to a barber shop, stopping to look in the window. He then returned in the direction of his car. At this point he was stopped by the officer and was nervous and evasive in answering questions. The defendant lied about a prior arrest and denied

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[71] *People v. One 1960 Cadillac Coupe*, 62 Cal. 2d 92, 95-96, 396 P. 2d 706, 708 (1964).

[72] *Ibid.*

knowledge of the kit. Thereafter, through a set of circumstances irrelevant to this brief, narcotics were found on his person.

The California Supreme Court held the initial stopping unlawful for the following reasons:

> "In the instant case the officers observed only that defendant was nervous, appeared to be wary of them, and that he parked his car adjacent to the point where the kit was found and thereafter took a rather aimless walk in the near vicinity. Further observations by the arresting officer to the effect that Reulman looked like an untruthful person and as though he did not belong in the Cadillac are not impressive and appear to add little to create any real suspicion, even when we consider that the officer was an experienced narcotics investigator, familiar with the conduct of suspects in like circumstances. (See *People v. Cowman*, 229 Cal. App.2d 109 [35 Cal.Rptr. 528].) We find little, if anything, to distinguish Reulman from any other harried citizen who may have innocently parked his automobile in the same spot as did Reulman. The trial judge's finding that reasonable cause for detention and questioning is lacking is thus substantially supported by the record.[73]

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[73] *Id.* at 96; 396 P. 2d at 709. See also *People v. Henze*, 253 A.C.A. 1083, ... Cal. Rptr. .... (1967) and *People v. Hunt*, 250 A.C.A. 377, 58 Cal. Rptr. 385 (1967), in each of which the Court held the officer did not have sufficient cause to engage in a temporary field detention. It should be noted that in addition to these reported cases in which the temporary field detention was declared unlawful, there are additional appellate cases in California so holding which are not reported in an official reporter because of the rule in California that not all decisions need

(This footnote is continued on the next page)

B. When Can a California Citizen Be Subjected to a Protective Patdown?

The test established by the California Supreme Court for a protective patdown is as follows:

> "If the circumstances warrant it [a police officer] may in self-protection request a suspect to alight from an automobile or to submit to a superficial search for concealed weapons."[74]

Here again, lest it be thought that such a test is so imprecise as to fail to permit distinctions of constitutional magnitude, one need only consider the facts and holding of the case in which this rule was announced. In *People v. Mickelson*[75] an officer had gone to a market where a robbery had just been reported. The robber was described as a fairly tall white man of large build with dark hair wearing a red sweater and armed with a .45 automatic. While driving away from the market 20 minutes later the officer saw a station wagon coming toward him with two persons in it. This was about six blocks from the market. The driver matched the description of the robber. The station wagon proceeded to drive around the area making numerous turns. The officer overtook the station wagon and observed the passenger, the defendant in this case, bend forward in the seat, forward and down and raise

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be published. (See, for an example of such an unreported ruling striking down a temporary field detention, *People v. Dresslar*, Crim. No. 12345 (1966), decided by the Court of Appeal, Second Appellate District, Division 4.) Additionally, trial courts in California are not required to render any written opinion in cases where, because of an unlawful temporary field detention or protective patdown, they refuse the admissibility of evidence, resulting in the acquittal of the defendant.

[74] *People v. Mickelson*, 59 Cal. 2d 448, 450, 380 P. 2d 658, 660 (1960).

[75] *Ibid.*

back up. The officer stopped the station wagon. While the officer was radioing for assistance, the driver walked back to talk to him. The driver stated that he was trying to get home, was lost and was looking for a freeway. The assisting officers arrived. Defendant, a passenger in the car, got out of the car on the request of the police. The police then looked in the car and an overnight bag was found stuffed under the right front seat. The bag was opened and found to contain four screwdrivers, a flashlight, a pair of gloves, and two socks, one of which was full of nickels, dimes and quarters later determined to have been burglarized from telephone booths. Defendant and the driver were arrested on suspicion of burglary. The officer stated that his purpose in examining the bag was the possibility of a gun being there.

The California Supreme Court held as follows:

> "Both occupants were out of the car away from any weapons that might have been concealed therein. Instead of interrogating Zauzig [the driver] and defendant with respect to the robbery or requesting them to accompany the officers the few blocks to the market for possible identification, the officer elected to rummage through closed baggage found in the car in the hope of turning up evidence that might connect Zauzig with the robbery. That search exceeded the bounds of reasonable investigation."[76]

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[76] *Id.* at 454; 380 P. 2d at 662.

C. In Those Situations Where a Protective Patdown Is Permissible, to What Degree of Probing Must a California Citizen Be Subjected as Part of the Protective Patdown?

The California Supreme Court has, so far, not had occasion to verbalize a test for the degree of probing permissible as an incident of a protective patdown. However, at least one court of appeal has discussed this problem and has made a significant constitutional distinction between proper and improper practices.

In *People v. Martines*[77] two officers noticed defendant and two companions at 1:15 a.m. walking through an unlighted alley at the rear of a closed business area. The officers stopped defendant and asked him for identification. Defendant stated that he had none. One officer made a cursory search of defendant due to the darkness in the alley and for his own safety. The search was only of the outside of defendant's clothing. The officer felt an object that appeared to be a knife in defendant's pocket. In attempting to remove the knife he removed a paper wad which was found to contain 9 marijuana cigarettes. Defendant made no threatening moves or offensive or aggressive statements. The object thought possibly to be a knife was a combination metal nail file-bottle opener. When closed it was ½ inch wide, ½ inch thick and 2¼ inches long. When opened it contained a small blade, a nail file and a bottle opener.

The Court of Appeal stated as follows:

> "In the circumstances a cursory search was warranted. Nothing was revealed by the cursory

[77] 228 Cal. App. 2d 245, 39 Cal. Rptr. 526 (1964).

search which warranted the officer in emptying appellant's pocket as he did. . . .

"In the case at bar it seems that the cursory search made should have reassured the officer rather than have alarmed him."[78]

From the above study of California cases it is apparent that those who would detract from the feasibility of establishing a constitutional standard for temporary field detention and protective patdown on the ground that it is impossible to establish a standard which will be capable of distinguishing proper from improper police conduct simply do not give the judiciary due credit for their abilities.

CONCLUSION.

It would be naive to state that members of minority groups are never harassed by the practice of temporary field detention and protective patdowns. It is just as naive to tell policemen that they do not need to use either of these practices in their work. Irrespective of the degree of truth in either of these statements, undoubtedly each of these opinions is the prevailing view

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[78] *Id.* at 248; 39 Cal. Rptr. at 528. *Accord, People v. Simon,* 45 Cal. 2d 645, 290 P. 2d 531 (1955), wherein the California Supreme Court, although not stating any general rule relating to the intensity with which a protective patdown could be conducted, applied its conception of such intensity in the following language:

"Even if it were conceded that in some circumstances an officer making such an inquiry might be justified in running his hands over a person's clothing to protect himself from an attack with a hidden weapon, certainly a search so intensive as that made here could not be so justified. . . . In the present case the officer searched first and asked questions only after his search uncovered the incriminating cigarette, and there is nothing to indicate that had he confined himself to a reasonable inquiry, he would have discovered anything to confirm his suspicion that defendant had no lawful right to be where he was." 45 Cal. 2d at 650, 290 P. 2d at 534.

within the particular group under consideration, *i.e.*, the minority groups and the policemen. It would certainly be worthy of the dignity of the law if it could give recognition to both these views in such a way as to accommodate both. This would truly benefit minority groups as well as policemen in their respect both for each other and for the law. Thus there would be "no war between the Constitution and common sense."[79]

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[79] *Mapp v. Ohio*, 367 U.S. 643, 657 (1961).

APPENDIX.

States.

ALASKA

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CALIFORNIA

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DELAWARE

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ILLINOIS

People v. Henneman, 367 Ill. 151, 10 N.E. 2d 649 (1937).[2]

MARYLAND

Shipley v. State, 243 Md. 262, 220 A. 2d 585 (1966).

MASSACHUSETTS

Mass. Gen. Laws, ch. 41, § 98 (1958).

Commonwealth v. Lehan, 347 Mass. 197, 196 N.E. 2d 840 (1964).

MINNESOTA

State ex rel. Ogg v. Tahash, 273 Minn. 187, 140 N.W. 2d 692 (1966).

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[1]This case has been questioned by one commentator on the ground that the standard for detention as set forth in the statute was judicially interpreted to be the equivalent of probable cause. Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest*, 51 J.CRIM.L.C. & P.S. 402, 402-03 (1960).

[2]Although this case is pre-*Mapp v. Ohio*, it is nevertheless relevant in that Illinois had already adopted the exclusionary rule. *People v. Castrie*, 311 Ill. 392, 143 N.E. 112 (1924).

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OHIO

State v. Terry, 5 Ohio App. 2d 22, 214 N.E. 2d 114 (1966).

OKLAHOMA

State v. Chronister, 353 P. 2d 493 (Okla. Crim. 1960).[3]

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[3]Although this case is pre-*Mapp v. Ohio*, it is nevertheless relevant in that Oklahoma had already adopted the exclusionary rule. *Gore v. State*, 24 Okla. Crim. 394, 218 P. 545 (1923).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 67

JOHN W. TERRY,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, AS AMICUS CURIAE.

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BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, AS AMICUS CURIAE.

Interest of the Amicus Curiae.

Americans for Effective Law Enforcement is a non-partisan, non-political, not-for-profit organization, incorporated under the laws of the State of Illinois in 1966. It has also been declared a tax-exempt, educational corporation by the United States Treasury Department.

Although generally concerned with the problems of crime and the effective administration of criminal justice in America, a specific objective of AELE is participation in significant cases, in this and other courts, which will, by their holdings, profoundly affect not only the rights of individual defendants confronted by the processes of the law, but also the right of all our citizens to "secure for themselves the domestic tranquility and justice that has been

guaranteed in the Preamble to The Constitution of the United States.'"[1]

Like another *amicus* in this case,[2] AELE is concerned about persons beyond the litigants, and about issues beyond those immediately raised by the litigants' briefs.

Without derogating the concern of another *amicus* for the innocent citizens who are subjected to field interrogations—and especially those who have been the victims of *abusive* field interrogations—it needs to be made clear that there are other Americans, by far the majority, who have an interest in seeing that *reasonable,* non-abusive police procedures which prevent crime and catch criminals are sustained by the courts.

AELE's deep rooted interest on behalf of the citizenry at large is embodied in recent statements appearing in the President's Crime Commission Report:

> "There is much crime in America, more than ever is reported, far more than ever is solved, far too much for the health of the nation. Every American knows that. Every American is, in a sense, a victim of crime. Violence and theft have not only injured, often irreparably, hundreds of thousands of citizens, but have directly affected everyone."
>
> ". . . the fear of crimes of violence is not a simple fear of injury, or death or even of all crimes of violence, but, at bottom, a fear of strangers. * * * This fear of strangers has greatly impoverished the lives of many Americans, especially those who live in high-crime neighborhoods in large cities. People stay behind the locked doors of their homes rather than risk walking in the streets at night. Poor people spend money on taxis because they are afraid to walk or use public transportation. Sociable people are afraid to talk to those they do not know. In short, society is to an in-

1. Preamble to the By-Laws of Americans For Effective Law Enforcement, Inc., 2.

2. The NAACP Legal Defense and Educational Fund, Inc.

creasing extent suffering from what economists call 'opportunity costs' as the result of fear of crime. * * * When many persons stay home, they are not availing themselves of the opportunities offered in their communities, and they are not visiting their friends as frequently as they might. The general level of social interaction in the society is reduced.

When fear of crime becomes fear of the stranger the social order is further damaged. As the level of sociability and mutual trust is reduced, streets and public places can indeed become more dangerous. Not only will there be fewer people abroad but those who are abroad will manifest a fear of and a lack of concern for each other. The reported incidents of bystanders indifferent to cries for help are the logical consequence of a reduced sociability, mutual distrust, and withdrawal.

However, the most dangerous aspect of a fear of strangers is its implication that the moral and social order of society are of doubtful trustworthiness and stability. Everyone is dependent on this order to instill in all members of society a respect for the persons and possessions of others. When it appears that there are more and more people who do not have this respect, the security that comes from living in an orderly and trustworthy society is undermined. The tendency of many people to think of crime in terms of increasing moral deterioration is an indication that they are losing their faith in their society. And so the costs of the fear of crime to the social order may ultimately be even greater than its psychological costs to individuals."[3]

We have set forth these apprehensions of the American people at length because we believe they vitally relate to the questions involved in this case. We believe that if field interrogation, or "stop and frisk" as it is most commonly (and sometimes most inappropriately) called is found to be

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3. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 1, 52 (hereinafter cited as COMMISSION REPORT).

at odds with the Constitution, the ability of the police to prevent crime and catch criminals will be sharply constrained. And the consequent physical and social impoverishment of our people will, tragically, increase.[4]

Apart from the desire of AELE to give voice to the American public concerned about crime and its consequences, we believe that it is important to also express what we think are the views of the law enforcement profession as a whole, unrestricted by the needs or desires to uphold a particular decision or to sustain a particular arrest or search. This position can be assumed by an *amicus* whereas it may not be available to a litigant. The importance of our stating these views is obvious in the light of the following considerations:

> "... many ... decisions [are] made without the needs of law enforcement, and the police policies that are designed to meet those needs, being effectively presented to the court. If judges are to balance accurately law enforcement needs against human rights, the former must be articulated. They seldom are. Few legislatures and police administrators have defined in detail how and under what conditions certain police practices are to be used. As a result, the courts often must rely exclusively on intuition and common sense in judging what kinds of police action are reasonable or necessary, even though their decisions about the actions of one police officer can restrict police activity in the entire nation."[5]

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4. "In society's day-to-day efforts to protect its citizens from the suffering, fear, and property loss produced by crime and the threat of crime, the policeman occupies the front line. It is he who directly confronts criminal situations, and it is to him that the public looks for personal safety. The freedom of Americans to walk their streets and be secure in their homes—in fact, to do what they want when they want—depends to a great extent on their policemen." COMMISSION REPORT 92.

5. COMMISSION REPORT 94.

Finally, we ask that the arguments which follow be judged in the light of the stated policy of AELE to support equal justice and equal treatment *for all.*[6]

The consents of the parties to our appearance as *amicus* in this case have been filed with the Clerk of this Court.

6. "In pursuing its objectives, AELE will adhere to the fundamental principles of justice and equal protection for all irrespective of color, creed, religion, social status or other individual or group characteristics. It emphatically rejects the support of, and will not support any individual, group, or activity that advocates racial bias or other unconstitutional concepts." By-Laws of Americans for Effective Law Enforcement 2.

ARGUMENT.

"To question all things . . . above all, to insist upon having the meaning of a word clearly understood before using it, and the meaning of a proposition before assenting to it. . . ."[7]

I.

WHAT STOP AND FRISK IS—AND WHAT IT IS NOT.

The law enforcement process which we ask this Court to sustain in the "stop and frisk" cases under consideration is simply this: A police officer may detain pedestrians or motorists in public places, and question them as to their identity and purpose in the particular location, when under the circumstances, such detention and questioning seems appropriate to a prudent police officer—one mindful of his responsibility "to prevent crime and catch criminals"[8]—because reasonable suspicion of criminality has been aroused, although there is not yet probable cause to believe that a crime has been, or is being, committed. Whether such police conduct violates the Fourth Amendment is the core of these cases. We believe that it does not.

All other issues in the cases are subsidiary. One, however, should be mentioned at this point, and it is of considerable importance: If the above described police conduct is constitutional, as we believe it is, the officer involved

7. From the inaugural address of John Stuart Mill as Rector, University of St. Andrews, February 1, 1867.

8. The phrase of Mr. Justice Schaefer for the Supreme Court of Illinois in *People* v. *Watkins*, 19 Ill. 2d 11, 19, 166 N. E. 2d 433, 437 (1960).

must have the power to act reasonably to protect himself from attack, or to prevent the suspect's escape, during the course of the detention and inquiry. Whether such power implicates only a "frisk", or authorizes a "search", is a question to which we shall return later.

One of the problems, of course, in pursuing a rational discussion of field interrogation is to be rid of the tyranny of labels to which the discussion about "stop and frisk" has been subjected in recent years by lawyers as well as laymen. Whether the process is known as "stop and frisk", "stop and question", "street stop", or "field interrogation", is not only unimportant, but misleading as well.

The power which we ask this Court to sustain will not receive appropriate analysis if the analysis proceeds upon the assumption, usually colored by emotional reaction to the phrase, that "stop" means an arbitrary selection of subjects and that "frisk" automatically follows a stop. On the other hand, we make no claim that arbitrary police action is any the less so because concealed behind the more neutral sounding facade of "field interrogation". We cannot, at this juncture, afford to get "hung up" on the name.

For this confusion law enforcement must share at least part, or perhaps most, of the blame. Traditionally, the term "field interrogation," has been used to describe a mixed bag of police techniques in aid of the patrol process, some of which are constitutional and some not.

> "A field interrogation is, in some circumstances, difficult to distinguish from an arrest and subsequent street questioning before the arrested person is taken to the station. In other circumstances, a field interrogation may be difficult to distinguish from crime-preventive street practices which have an objective other than arrest and prosecution of suspects. This is true, for

example, with respect to a street confrontation program designed to discover and confiscate knives, guns, and other weapons. Despite the difficulty in some situations of clearly distinguishing field interrogation from arrest, on the one hand, or from police on-the-street preventive practices, on the other, *observation of current police practice does disclose that field interrogation is an isolable police practice which has independent operational significance.*"[9]

We also believe that the kind of field interrogation described in our definition is an isolable police practice that can be sustained as constitutional. Whatever value the police attach to concomitant aspects of patrol as crime repression measures, however, cannot obscure the fact that their use is subject to serious constitutional question. What is important is the necessity, for present purposes, that the impermissible patrol practices be clearly identified and put to one side.

A current commentary on police patrol practices identifies at least three other techniques which may, in some instances, resemble the police field interrogation power for which we contend. These are: (1) the practice of regularly, and without particular cause, interrogating, searching, and sometimes arresting, known vice offenders;[10] (2) the practice of routine searches of males, particularly young males, in high crime areas, to discover and confiscate weapons;[11] and (3) the searching and dispersal from the streets of congregating members of teen-age gangs.[12]

All of these techniques, stated abstractedly, may be, and probably are, violative of the Fourth Amendment. We would not ask this Court to approve them, efficacious as they

9. TIFFANY, MCINTYRE & ROTENBERG, DETECTION OF CRIME 9 (1967) (hereinafter cited as DETECTION) (Emphasis added.)

10. DETECTION 11-12.

11. DETECTION 13.

12. DETECTION 13-14.

may be as crime prevention measures. The point we make is that they can be distinguished, and must be distinguished, from the practice of stopping *particular* persons, found in *particular* circumstances which indicate past, occurring, or potential criminal conduct, for the purpose of questioning —in some cases, followed, or even preceded, by the protective device of frisk or search for weapons. We reject absolutely the position of the other *amicus,*[13] and some of the commentators,[14] that this Court must also sustain these practices if our position be adopted.

The kind of constitutional field interrogation which can be isolated from other practices is illustrated by two cases: *Terry* v. *Ohio,* in which we appear as *amicus,* and *State* v. *Dilley,* 40 N. J. 460, 231 A. 2d 353 (1967), a recent decision of the Supreme Court of New Jersey.

In *Terry,* a detective with thirty-nine years of experience observed two men on a street corner in downtown Cleveland. For a period of ten to twelve minutes, he watched them as first one, then the other, repeatedly walked down the street, peered into the window of a jewelry store or an airline office, and then returned to converse. Shortly they were joined by a third man. A conversation ensued and the third man then departed. Thereafter, the original two walked several hundred feet down the street and again engaged in conversation with the third man. At this point, the detective, whose suspicions had been thus aroused, approached the three men, identified himself as a police officer and asked for their names. When he received only a mumbled reply, he turned one man around and patted down the outside of his clothing. This frisk revealed a hard

13. *Cf.* Brief for the NAACP as *Amicus Curiae* 45.

14. Schwartz, *Stop And Frisk: A Case Study in Judicial Control of the Police,* 58 J. CRIM. L., C. & P. S. 433, 443-44 (1967). *But see* Pilcher, *The Law and Practice of Field Interrogation,* 58 J. CRIM. L., C. & P. S. 465, 469 (1967); Younger, *Stop and Frisk: "Say It Like It Is",* 58 J. CRIM. L., C. & P. S. 293, 295 (1967).

object which, upon seizure, turned out to be a revolver. All three men were then ordered into a store and told to face the wall. A frisk of the second man disclosed another revolver. A frisk of the third man disclosed nothing.

The record is clear in *Terry* concerning the purposes for which the original stop and subsequent frisk were made. The officer testified that he approached the defendants to question them because "he suspected them of casing a job, a stick-up". When he received only a mumbled reply, he frisked them because "I felt as though they were going to pull a stick-up and they may have a gun".[15] In this case, therefore, there is no question about the motives of the officer. He was not engaged in an arbitrary or random stopping of persons on the street. He was not engaged in suppression of vice activities by the seizures of known vice offenders. He was not concerned with "getting the weapons off the street" of an urban ghetto. He was not seeking to establish his authority over the "turf" sought to be ruled by teen-age gang members. He was not seeking to ferret out contraband. He was investigating particular persons found in particular circumstances which indicated to him, as a reasonable and experienced police officer, that a crime might be about to occur, and he was doing it in a manner entirely, and purposefully, concerned with his own safety.

It may be argued that the conduct deemed suspicious by the officer in *Terry* could just as well have been innocent. The men could have been waiting for someone on the street corner. Another companion could have been making a purchase in the jewelry store and a display in the window of the airline office could have caught the eye of his friends waiting outside. The conversation with the third man might have been on some subject irrelevant to their im-

15. *State* v. *Terry*, 5 Ohio App. 2d 122, 214 N. E. 2d 114, 120 (Ct. App. 1966).

mediate purpose. But even in cases involving probable cause for arrest, it has never been held that the conduct of the defendants under examination must be entirely consistent with guilt and utterly inconsistent with innocence. Such a holding, indeed, would destroy the concept of probable cause as a viable standard.

An even stronger case is presented by *Dilley*. Here a veteran member of the New Brunswick police department was patrolling a high crime area in a police car at 3:00 A. M. "He knew the area very well, having been born and brought up there, and he described it in detail. He had worked in the area as a police officer for fifteen years, knew the people there and both Dilley and Brinkley [a co-defendant] were strangers to him." As the two men were walking down the street, "they kept turning their heads every few steps looking to the rear". "He drove on, making a series of turns, until he observed the men standing between two automobiles in a municipal parking lot. As he pulled into the lot, the men turned and walked back to the street. He followed and called to them to stop. He got out of his car, asked them what they were doing there and they replied 'nothing'. He told them they were under arrest and he gave the defendant Dilley 'a quick frisk' by patting him on the right side of his ski jacket. He felt a gun in Dilley's pocket and removed it. It was a loaded .38 caliber revolver. The other man . . . was also found to be armed."[16]

Reasonable men might well differ on whether the officer had probable cause for arrest when he stopped the men and frisked them, and, in fact, the Supreme Court of New Jersey declined to so hold. But reasonable men cannot differ, we believe, on whether there was, at that time, a reasonable suspicion of criminality which justified the officer in detaining the men for the purposes of further in-

16. *State* v. *Dilley*, 40 N. J. 460, 231 A. 2d 353, 354 (1967).

quiry. It is also important to note that the officer did not stop the men simply because they were walking down the street of a high-crime, low-income neighborhood at 3:00 A. M. and were unknown to him, nor did he stop them because they were standing between two parked cars. He stopped them only after they walked away from the lot as he pulled in, and he frisked them only after they gave an answer to his question which ascribed no reasonable purpose to their conduct.

In sanctioning what the officer did in *Dilley*, the Supreme Court of New Jersey did not, therefore, subject persons roaming the streets of the ghetto late at night to random or arbitrary stops and searches simply because of such behavior. People are entitled, we suppose, to walk the streets of a city at 3:00 A. M. with no purpose in mind. This right, however, does not immunize them from reasonable police inquiry when such conduct, considered in light of other circumstances, renders it reasonable for the police to inquire into possible criminality. The fact that innocent men may also walk the streets late at night does not immunize *all* who do so under *all* circumstances.

Here again, as was the case with *Terry*, no improper motive for the frisk can be imputed, on this record, to the officer. As the Supreme Court of New Jersey found, "When he frisked Dilley he did it for self-protection. He described his action as 'common police procedure' in accordance with formal instructions he had received in both federal and state police schools. He stressed that he was alone when he confronted the two men, that he did not know 'what they were carrying' and that it was 'very well possible' he could have been 'killed by one of them.' "[17]

We repeat that the police conduct involved in *Terry* and *Dilley* is the kind of conduct which can rightly be called

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17. 231 A. 2d at 354.

proper field interrogation. It may be separated, in the minds of the police and in the opinions of the courts, from related, but clearly distinguishable, field procedures which have as their purpose the suppression of vice, the confiscation of weapons, or the establishment of police "authority" over the streets in high-crime areas. More importantly, it may be sustained as constitutional without licensing either its abuse or the other practices of repression.

It cannot be denied that stopping persons on the street for questioning which involves detention against the will and, in some cases, a concurrent or subsequent frisk or search, is conduct subject to the commands of the Fourth Amendment. If the standard by which such conduct is to be judged, therefore, is the *same* standard of probable cause traditionally required for arrest, we concede that such conduct is, under the prior opinions of this Court, unconstitutional. But we believe that such an inflexible application of traditional probable cause to this conduct would be at odds with the whole spirit of the Fourth Amendment; that there may be a concept of *variable* probable cause which applies to pre-arrest investigatory procedures such as field interrogation, and that the true test is the *balancing* of the degree of interference with personal liberty against the information possessed by the officer which impelled him to act. This argument, and others, can best be made in response to specific issues raised by the brief for the NAACP Legal Defense And Educational Fund, Inc., as *amicus curiae*, and we turn, therefore, to a consideration of some of their arguments.

II.

THE POSITION OF THE OPPONENTS OF STOP AND FRISK.

(1) *"The evidence is weighty and uncontradicted, that stop and frisk power is employed by the police most frequently against the inhabitants of our inner cities, racial minorities and the underprivileged."*[18]

We are somewhat at a loss to appreciate the force of this argument in the Brief of the NAACP. It could as well be said that the *arrest* power is employed by the police most frequently against the inhabitants of our inner cities, racial minorities, and the underprivileged. Are the arrest statutes to be struck down on this account? Those who deal intimately with the day-to-day process of criminal justice in this country can testify that the entire machinery of the criminal law ensnares the poor more often than the wealthy, and this will continue to be true so long as poverty, lack of education, and lack of employment opportunities persist as causative crime factors. In many cities, minority group defendants compose a disproportionate share of the cases on the dockets of our criminal courts. Are they therefore immune from prosecution, conviction and punishment? May only the affluent, suburbanite members of a racial majority group be called to account for their crimes?

Perhaps the *amicus* means more than this. Perhaps the implication is that the stop and frisk power is *wrongfully*, and by evil design, employed by the police most frequently against the inhabitants of our inner cities, racial minorities, and the underprivileged.[19] If that is the argument, AELE rejects the claim that the evidence is "weighty and uncontradicted".

The President's Commission on Law Enforcement and

18. Brief for the NAACP 3.

19. *See* Brief for the NAACP 45, n. 79.

Administration of Justice had this to say with respect to the behavior of the police toward minority groups:

> "Commission observers watched policemen work in minority-group neighborhoods in a number of major cities, and the commission has studied the findings of those who have made observations in many other cities. These observations indicate that any generalization about how 'policemen' treat 'minority-group members', or vice versa, is almost sure to be misleading. For example, one commission study conducted in a few cities showed that most policemen treat minority-group citizens in a nondiscriminatory manner, and received at least as much cooperation and courtesy from Negroes as from whites."[20]

Following are statements that appear in the reports submitted to the Commission:

> "All citizens were asked about their views whether the police should have the right to stop them and question or search them. A substantial majority of the citizens believe that the police should at least under some conditions be able to stop and ask them their names and addresses (79 percent); an absolute majority of 56 per cent sets no conditions for stopping and asking them to identify themselves. In Boston there are no differences between Negroes and whites with almost 6 of 10 citizens saying they would not object to the police asking them to stop and identify themselves by name and address under any conditions."[21] * * *
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> "Assuming that police discretion is greater in the on-view encounter, it could also be assumed that officers will exercise that discretion more often with Negroes than whites (whether on grounds of a higher crime rate for Negroes than whites in these cities or on

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20. COMMISSION REPORT 99-100.

21. 1 STUDIES IN CRIME AND LAW ENFORCEMENT IN MAJOR METROPOLITAN AREAS (Field Surveys III) 87 (Report of a Research Study Submitted to the President's Commission on Law Enforcement and Administration of Justice, 1967).

grounds of discrimination, or some other basis). Correlatively, aggravated assaults and other kinds of violence are more commonly observed for Negroes than whites in dispatched encounters in these cities so that the officer more likely would need to search Negroes than whites for his own protection in dispatched encounters. * * * *Personal searches conducted on Negroes are over twice as productive of weapons as are those conducted on whites.*

"In on-view situations one-in-five frisks of a Negro yielded a gun; for whites the proportion was one-in-ten. * * * *In both types of mobilization [dispatched and on-view] the police more frequently conduct personal searches on Negroes than on whites; Negroes object less often, but they are more likely to be carrying weapons than whites.* * * * It is problematic whether police officers *cognitively* as well as *behaviorally* search those citizens upon whom their searches are most likely to be successful. The observations do not allow for inferences about police motivations. This 'attempt-success ratio' is clear as a behavioral phenomenon, nevertheless."[22]

In any event, if the police more often exercise the power of stop and frisk against inner city residents, the poor, and the minority groups because *all* the forces of the criminal process operate more often against such persons, it follows that when the police wrongfully use such power—whether by design or mistake—they will do so against the same people. What does not follow, however, is the conclusion that the *proper* exercise of such power should therefore be declared unconstitutional.

(2) "*. . . the Court is now asked for the first time to legitimate criminal investigative activity that significantly intrudes upon the privacy of individuals who are undif-*

22. 2 STUDIES IN CRIME AND LAW ENFORCEMENT, 85-88 *supra* n. 21 (Emphasis in original.)

23. Brief for the NAACP 10-11.

ferentiable from Everyman as the probable perpetrators of a crime."[23]

Other persons were walking the streets of Cleveland at the time of the encounter which led to the stop, frisk and arrest in the *Terry* case; they were not stopped, frisked, and arrested. The record in this case makes plain that there was conduct which reasonably differentiated Terry from "Everyman". The record in the *Dilley* case makes plain that there was conduct which reasonably differentiated Dilley and his companion from "Everyman".

The NAACP argument does not hold unless it is directed to the *arbitrary* conduct of police or to field investigative procedures which are aimed at weapons confiscation and are therefore directed against a large enough class to include, at least at that time and in that place, "Everyman". The answer is that we are not asking this Court to "legitimate" such "criminal investigative activity". We have already said that such conduct is unconstitutional.

(3) *"However intellectually reasonable Dean Barrett's balancing approach may be in the corridors of academe, it is a delusive and unworkable proposition on the streets of our cities, and particularly on the streets of our ghettos where stop-frisk logic does its daily work. Closely inspected, we believe, both the 'balancing' theory of Fourth Amendment rights and the Stop-Frisk Model that is built upon it show themselves to be mere fine, scholastic pretexts for oppression. The 'minor interference with personal liberty' that they sanction is a major interference; the protections which they promise are unreal illusions; the 'balance' scale which they purport to employ is invariably tipped by the police commissioner's thumb; and their consequence is nothing more or less than a police dictatorship of the streets.*"[24]

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24. Brief for the NAACP 34.

There are several things wrong with this argument.

First, the argument assumes that only those who have spent half their lives in squad cars, or perhaps all of their lives on the streets of the ghetto, are qualified to speak on the proper interpretation of the Fourth Amendment. Dean Barrett is obviously not. Confined as he is to "the corridors of academe", spinning out theories both "delusive and unworkable", it is not surprising that his arguments are viewed by some as only "fine scholastic pretexts for oppression" whose "consequence is nothing more or less than a police dictatorship of the streets".

If this attack were confined simply to Dean Barrett, perhaps one of the country's foremost commentators on the criminal law in general, and the Fourth Amendment in particular, it could be discounted, questions of taste aside. Alas, however, this Court also appears to have been taken in by Dean Barrett. For in the same article[25] in which he suggested the balancing approach to the question of Fourth Amendment application to pre-arrest investigatory procedures, Dean Barrett severely criticized both the rationales and consequences of this Court's holding in *Frank* v. *Maryland,* a case that has lately been overruled,[26] and precisely upon the grounds urged by him. But perhaps the "corridors of academe" are merely one-way streets.

Second, Dean Barrett's argument, which the NAACP characterizes as the "most articulate expression" of the balancing rationale, is not fully treated in the *amicus* brief. It deserves further explication here. Dean Barrett first set forth the kinds of police conduct under scrutiny:

> "Investigation is the process by which police are able to acquire that 'probable cause' which will justify the arrest and prosecution of a suspected offender. * * *

25. Barrett, *Personal Rights, Property Rights, And The Fourth Amendment,* SUP. CT. REV. 46, 72-74 (1960).

26. *Camara* v. *Municipal Court,* 387 U. S. 523 (1967).

> The process of investigation necessarily involves *varying degrees of interference* with the privacy of suspected offenders. 'Stakeouts' with the police watching a man's house, the tailing of suspects, the use of undercover agents, and similar investigative techniques result, obviously, in invasions of privacy which are offensive to the person involved. Stopping and questioning suspicious persons on the street involves a greater degree of restriction on personal liberty. * * *
>
> Yet if the general public interest in adequate law enforcement is to be served, it is clear that police must be given reasonably wide powers of investigation. Furthermore, if the goal is to protect individuals from the serious invasion of personal rights which results from formal arrests and charges of crime in the absence of clear showing of probable cause to believe that they have committed a crime, reasonable latitude must be given for investigative techniques of the kind just described. On the other hand, it is obvious that some restraint must be placed upon the police because *indiscriminate* use of these techniques could be unreasonably oppressive."[27]

He then described the difficulties encountered when on-street investigative conduct is held to be an interference with liberty in the traditional sense of an "arrest":

> In applying the Fourth Amendment to the investigative process the Court makes the issue turn upon traditional tort law concepts. * * * If he [the officer] restricts the liberty of movement of the suspect sufficiently to commit the tort of false imprisonment, he can justify his action only by demonstrating that he had probable cause to make a formal arrest. * * *
>
> The result of this all-or-nothing approach is to place too little restraint on some investigative techniques and too great restraint on others. It tends to defeat the fundamental objectives of the Fourth

27. *Barrett, supra* n. 25 at 57-58 (Emphasis added.)

> Amendment by attempting to establish the same protection against relatively minor violations of person and privacy as against the most serious ones. The problems here can be illustrated by a consideration of . . . . [*Henry* v. *United States*, 361 U. S. 98 (1959)] . . . ."[28]

Henry is the only case decided by this Court in which it may be said that the question of the propriety of a field interrogation on less than probable cause was considered. The facts of the case are simple. The FBI, in the process of investigating the theft of an interstate shipment of whiskey were told by an official of the trucking company that the defendant Pierotti was somehow "implicated" with interstate shipments. Thereafter Pierotti and the defendant Henry were seen leaving a tavern in the neighborhood where the theft occurred. They drove away together, and stopped in an alley in a residential neighborhood. Henry entered a residence and returned with cartons. The automobile then drove away and was lost by the surveilling agents. Sometime later the car was again seen near the tavern and the defendants' actions were repeated. As the car drove away from the residence a second time, loaded with more cartons, it was curbed by the agents. As Henry alighted from the car, he was heard to say to his companion "Hold it; it is the G's", and "Tell him you just picked me up". Looking into the car, the agents saw cartons with "interstate" labels. The defendant told the agents that the cartons were in the car when he and Pierotti had borrowed it, a statement the agents knew to be untrue.

In *Henry*, the government conceded that an arrest took place when the defendants' freedom of movement was interrupted, that is, when the FBI signaled the car to the

28. *Id.* at 58-59.

curb. Finding no probable cause for arrest at this point, a majority of this Court held the arrest to be unconstitutional.

Though the majority opinion in *Henry* simply holds that arrests cannot be made without probable cause, there is no explicit rejection of the proposition that investigative actions not amounting to arrest may be made on less than probable cause. Under these circumstances, it might well be argued that the government's concession foreclosed the majority's consideration of this issue. The dissent in *Henry* explicitly said that the officers possessed sufficient information at the time of the stop to warrant further pre-arrest investigation; that this investigation could take the form of a stop and detention for questioning; and that probable cause was not required for this action. Thereafter, the dissent argued, probable cause was found when the nature of the information received by the agents during the stop was added to what they knew before the stop was made. Mr. Justice Clark said:

> "The earlier events [prior to the stop] certainly disclosed ample grounds to justify the following of the car, *the subsequent stopping thereof, and the questioning of petitioner by the agents.*" [29]

In our view, therefore, the dissenting opinion in *Henry* is explicit authority for the proposition we advance in this case: that a police officer having reasonable suspicion of criminality may stop, detain, and question for the purpose of ascertaining whether probable cause may be found to support an arrest.

The NAACP, as *amicus*, contends that the government's concession concerning the time of the arrest was not the controlling factor in *Henry* since the opinion of the majority went on to say "That [the proposition that the arrest

29. 361 U. S. at 106.

took place at the stop] is *our* view on the facts of this particular case.'"[30] If, indeed, this Court held in *Henry* that an arrest requiring probable cause took place at the time the FBI stopped the car, then, of course, *Henry* is authority contrary to our position in this case. If that be so, we request that *Henry* now be reconsidered and overruled.

The view that *Henry* stands for the proposition that pre-arrest field detention cannot be made on less than probable cause is also hard to reconcile with the Court's subsequent disposition of *Rios* v. *United States*.[31] There the government specifically argued that "the policemen approached the standing taxi only for the purpose of routine interrogation, and that they had no intent to detain the petitioner beyond the momentary requirements of such a mission". This argument was not challenged by the Court's opinion; in fact the Court seemed to say that if the narcotics had been exposed during such a period "a lawful arrest could then have been supported by their reasonable cause to believe that a felony was being committed in their presence".[32] The case was then remanded for factual findings on when the arrest occurred. If *Henry* was decided, not upon the government's concession, but upon the Court's view of the facts, it follows that the Court would have held that the arrest in *Rios* took place when the police approached the taxi with the intention of detaining the defendant for the purposes of interrogation and there would have been no need for a remand.

In any event, the authority of *Henry* as support for the argument that field interrogation without probable cause violates the Fourth Amendment is persuasively diminished, we believe, by Dean Barrett's conclusions, which we adopt:

30. 361 U. S. at 103 (Emphasis added.)
31. 364 U. S. 253 (1960).
32. 364 U. S. at 262.

"The question may be asked whether it is wise to resolve problems of the type presented in *Henry* and *Rios* in terms of tort law-concepts. * * * Would not the policy of the Fourth Amendment be better served by an approach which determines the reasonableness of each investigative technique by balancing the seriousness of the suspected crime and the degree of reasonable suspicion possessed by the police against the magnitude of the invasion of the personal security and property rights of the individual involved?

If one looks at the problem in these terms, it becomes rational to argue that in *Henry* the police did have sufficient grounds for suspicion to justify the relatively minor interference with the personal liberty and property rights of Henry and Pierotti which was involved in stopping their car, questioning them, and looking through the open car door. In fact, did not the police act in a way which properly balanced the policies of the Fourth Amendment against the practical consequences to the suspected individuals?"[33]

We believe that the recent opinion of this Court in *Camara* v. *Municipal Court*[34] also supports the validity of the argument that governmental intrusion into areas of privacy may be measured in terms of degrees and that the application of the Fourth Amendment in response to such intrusions is not inflexible. In *Camara,* the Court agreed "that a routine inspection of the physical condition of private property is a less hostile instrusion than the typical policeman's search for the fruits and instrumentalities of crime".[35]

What is the essential difference between that view and a recognition that detention for field interrogation purposes involves "a less hostile intrusion" than an arrest which leads to custody and the preferment of charges? We submit there is none.

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33. *Barrett, supra* n. 25 at 64.
34. 387 U. S. 523 (1967).
35. 387 U. S. at 530.

The *Camara* opinion then goes on to say that even the administrative search involved there was governed by Fourth Amendment standards and that an individual's rights under such a search were not merely "peripheral" to the "Fourth Amendment interests at stake".[36] But we are willing to make the very same concession here. There is no doubt that pre-arrest field detention for interrogation is conduct which is subject to regulation under the Fourth Amendment and that when based on grounds less than reasonable suspicion of criminality is unconstitutional.

Finally, the holding in *Camara*—that probable cause for the issuance of a warrant may be found on grounds less than those traditionally applied in Fourth Amendment cases—demonstrates conclusively, we believe, that this Court is willing to fashion rules which refuse to strait-jacket Fourth Amendment responses to differing degrees of governmental intrusions on privacy.

Essentially, the NAACP derides the balancing approach because it believes that "reasonable suspicion" cannot be defined. They say:

> "But as to what citizen is it not reasonably possible that he has committed some crime? As to what unknown citizen on the street (even a crowded street) near the scene of a known crime? As to what group of ill-dressed young men on a ghetto street corner? As to what Negro abroad on the streets in a 'white' neighborhood late in the day? Surely, it is reasonably possible that each of these has committed a crime (or is about to commit one, as the New York statute and common *Stop-Frisk* logic provide)."[37]

The answer is, that without more, to *none* of them. It is not reasonably possible (in the sense that we, and all the courts which have upheld field detention, use the phrase

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36. *Id.*

37. Brief for the NAACP 39-40. See also 45.

"reasonable suspicion") to believe that anyone in these categories has committed a crime and so is subject to detention. If the examples recited above contain all the information known to the officer, he is not authorized, under the Fourth Amendment, to detain for interrogation. In effect, the *amicus* has constructed *his* examples of "reasonable suspicion", and then, arguing their invalidity, has concluded that *our* definition is unworkable and unconstitutional. Since we emphatically reject his premise, we reject also his conclusion.

(4) *"The courts have not in fact imposed any limitations or restrictions upon the stop and frisk power once that power is granted. They have not done so because they could not do so—because the essence of the doctrine of stop and frisk on less than probable cause is judicial abdication to police judgment."*[38]

There are several answers to this argument. First, those courts which have upheld stop and frisk in cases we believe to have been rightly decided (*Terry* and *Dilley*) have not demonstrated "judicial abdication to police judgement". Second, there exist numerous cases where state courts of review, in construing traditional Fourth Amendment rules, have, in the judgment of this Court, erred and have been corrected. If there are cases dealing with stop and frisk which have been wrongly decided, explication of the proper principles governing the disposition of the cases now before the Court will serve to mark out standards in later cases. It would hardly be surprising to find a few improper dispositions in an area of the law which, to date, contains no precedential opinion of this Court. What is surprising is the implicit assumption of the *amicus* that, thereafter, the state trial and appellate courts would continue to sustain field interrogation cases on less than reasonable grounds.

38. Brief for the NAACP 47.

Nothing in the history of Fourth Amendment law warrants this conclusion.

(5) *Courts cannot control the "frisk" or "search" power since they "cannot be faulted for believing that an officer may always 'reasonably suspect' he is in danger. That is the nature of reasonable suspicion."*[39]

We can conceive of no reason why a decision whether an officer rightfully frisked or searched following a detention should be any harder to make than the decision whether an officer rightfully frisked or searched following an arrest. Since the standard is the same in both cases—a reasonable need to protect the life of the officer or to prevent escape—why should there be any difficulty in applying uniform rules? Moreover, frisk or search will no more automatically follow detention in every case than does frisk or search automatically follow arrest in every case. The experience of prior cases demonstrates that the courts have had no difficulty in concluding that every police custody does not call for a search incident to arrest even though the arrest is made on probable cause. A reference to representative opinions in which state courts of review have refused to authorize blanket incidental searches, even for weapons, in traffic arrests will illustrate the point.[40]

AELE does not adhere to the view that since a *search* can be made only incident to an arrest on probable cause, only a *frisk* may be made incident to a detention on reasonable suspicion. The nature of the initial interference with liberty is irrelevant to the kind of action which may be taken by the officer for his own protection. Some detentions may be more dangerous than arrests. Others will present less risk to the officer. In both arrest and detention cases, the proper question, in our view, is whether the action taken

39. Brief for the NAACP 51-52.

40. *See* SCHAEFER, THE SUSPECT AND SOCIETY 42 (1967).

by the officer was reasonably necessary for his own protection.[41] Whether a search, frisk, or no action at all is proper is a question to be determined by the facts of each case. Under this standard the actions taken by the officers in *Terry* and *Dilley*, for example, were reasonable in light of the position in which they found themselves and should be upheld.

(6) *"... we anticipate that the States of New York and Ohio will make the familiar inflated claims for stop and frisk as tools of law and order. If they do, let there be no mistake about this call to practicality. Whatever its conveniences and benefits to a narrow view of law-enforcement, stop and frisk carries with it an intense danger of inciting destructive community conflict."*[42]

Essentially, what the *amicus* is saying is that since the stop and frisk practice presents a danger of police-citizen conflict, it ought to be outlawed because the consequent deterioration of police-community relations will erode rather than strengthen law enforcement.

If only field interrogation under *reasonable* circumstances is authorized by the court as constitutionally permissible, it makes no sense to say that the practice must be abandoned because it will exacerbate police-citizen relations in the ghetto. Under some conditions even *proper* use of such law enforcement powers like arrest, search, indictment and prosecution will strain relations between society and persons subjected to those powers.[43]

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41. Pilcher, *The Law and Practice of Field Interrogation*, 58 J. CRIM. L., C. & P. S. 465, 479-84 (1967); Stern, *Stop and Frisk: An Historical Answer to a Modern Problem*, 58 J. CRIM. L., C. & P. S. 532, 538 (1967).

42. Brief for the NAACP 68.

43. "It is not possible for the police to enforce the law and preserve the peace without incurring some hostility and resentment. This is inherent in the very nature of police work." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 178.

Even assuming that field interrogation procedures may endanger the effectiveness of law enforcement because of the hostility created in the ghetto, the decision whether the cost outweighs the gain is one for the states to make—either by action of the legislature in restricting police powers or by administrative action of the police themselves. It is not a decision for this Court. It has nothing to do with the question of whether stop and frisk is constitutional.[44]

Carried to its logical end, the *amicus* argument would compel the abolition of all law enforcement techniques which create police-community hostility. We suppose that many of the ghetto residents who rebel at the notion of stop and frisk being practiced in their community would object to even the very *presence* of police in their community—especially in the numbers suggested by *amicus* as an alternative to detention.

The police could, of course, withdraw from the ghetto and end all police-citizen conflicts. This alternative might be somewhat tolerable, if only criminals lived in the ghetto; at least *their* interferences with human liberty in the form of murder, robbery, rape and other crimes, would be practised only upon each other. But others live in the ghetto as well—innocent, law-abiding American citizens; by far the overwhelming majority. They are entitled, under the same Constitution which the *amicus* says compels the rejection of stop and frisk, to live their lives, and experience the safety of their homes and their streets without fear of criminal marauders. They have suffered enough—discrimination, poverty, lack of education, appalling conditions of

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44. "In order to balance the need for field interrogations and the harmful effect on police-community relations which may result from their *indiscriminate* use, State legislatures should define the extent of police authority to stop and question persons, and police departments should adopt detailed policies governing this authority whether or not legislation exists." TASK FORCE REPORT: THE POLICE *supra* note 43 at 185 (Emphasis added.)

housing, and community alienation. Must they also be deprived of their right to the protection of the law as well?

Conclusion.

Despite the evidence which has been found of cases in which *some* police have abused field interrogation in *some* instances—evidence upon which the *amicus* relies so heavily —the President's Commission on Law Enforcement and Administration of Justice unanimously recommends its adoption and use:

> "'The Commission believes that there is a definite need to authorize the police to stop suspects and possible witnesses of major crimes, to detain them for brief questioning if they will not voluntarily cooperate, and to search such suspects for dangerous weapons when such precaution is necessary.'"[45]

Amicus Curiae requests that the judgment in *Terry* v. *Ohio* be affirmed.

Respectfully submitted,

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45. TASK FORCE REPORT: THE POLICE, *supra* note 43 at 184. *See also* COMMISSION REPORT 94-95.

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No. 67

In the Supreme Court of the United States

OCTOBER TERM, 1967

JOHN W. TERRY
v.
STATE OF OHIO

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OHIO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INTEREST OF THE UNITED STATES

Although there is no federal statute comparable to the so-called "stop and frisk" laws adopted in many States, the United States has a direct interest in the definition of the power of law enforcement officers to detain persons without formal arrest in the course of investigating crime. Federal agents, although they do not exercise the broad powers of local police, are not infrequently confronted with situations where effective law enforcement in the areas within their jurisdiction would require them to stop and detain persons for a limited period of time in order to obtain and verify information. Also, of course, investigations by local police frequently produce evidence of

federal crime. The question whether such evidence was lawfully obtained in the first instance has obvious consequence for federal law enforcement.

We are filing our brief in the *Terry* case since its context is not unlike that which is apt to characterize a typical federal case; that is to say, it concerns the general powers of law enforcement officials and does not turn on a specific statutory definition of police authority. The fundamental question, as we view it, is whether it is consistent with the Fourth Amendment's guaranty of the "right of the people to be secure in their persons" against "unreasonable searches and seizures" to recognize a right of law enforcement officers to stop and detain a person for a limited period for the purpose of investigation. We urge that such a limited detention need not be regarded as an arrest, and that therefore the basis for such detention need not satisfy the standard of probable cause which would have to be met in order to secure a warrant of arrest. The Fourth Amendment guaranty against unreasonable searches is satisfied if the detention is reasonable under the circumstances, which necessarily must vary from situation to situation. This is not to argue that the Fourth Amendment is inapplicable to police conduct fairly described by the term, "stop and frisk"; rather, it is to say that a lesser showing will meet the constitutional test of reasonableness in the case of a brief detention on the street than in the case of a conventional arrest. If a right of limited detention does exist, we suggest further that a law enforcement officer has the right to pat down the suspect's outer clothing in order to determine whether

he possesses a weapon, assuming that this step appears reasonably necessary for the detaining officer's self-protection.

I. THE FOURTH AMENDMENT PERMITS REASONABLE LIMITED DETENTION FOR INVESTIGATION

A. A DISTINCTION MAY VALIDLY BE DRAWN UNDER THE FOURTH AMENDMENT BETWEEN ARRESTS AND LIMITED DETENTIONS FOR INVESTIGATION

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

The heart of the problem is whether the limited "seizure" of the person involved in a brief detention by police for investigation is equivalent to the seizure under a warrant for which the Fourth Amendment requires probable cause. This is often phrased in terms of whether such seizure should be deemed an arrest. However mere reference to terminology does not resolve the issue. The term arrest—which does not appear in the Fourth Amendment—has different shades of meaning in differing contexts. As was said in *United States* v. *Bonanno*, 180 F. Supp. 71, 77 (S.D. N.Y.), reversed on other grounds *sub nom. United States* v. *Bufalino*, 285 F. 2d 408 (C.A. 2):

> In dealing with words there is always a temptation to allow them to become separated from

> their objective correlatives in the everyday world, and to treat them as if they have, or ought to have, one single simple meaning, unaffected by the contexts in which they occur and divorced from the world of things and events which give them their content and justification.
>
> "Arrest" is just such a word, not only because it is necessarily unspecific and descriptive of complex, often extended processes, but because in different contexts it describes different processes, each of which has built up, in both legal and common parlance, sharply divergent emotional connotations.

An arrest under a warrant of arrest involves more than the mere stopping of a person on the street or in a car; even when the stopping is by a police officer. An arrest under a warrant is for the purpose of bringing the individual "before a court, body or official or of otherwise securing the administration of the law." Perkins, *The Law of Arrest,* 25 Iowa L. Rev. 201 (1940); Hall, *Law and Government, The Law of Arrest,* 1–4 (2d ed. 1961). In its criminal aspect, it is the taking of a person into custody so that he may be available to answer for the commission of a crime.[1] Similarly, an arrest without a warrant for a specific crime is not only to restrain the individual, but to take him into custody to answer criminal charges. For that

[1] See 1 Varon, *Searches, Seizures and Immunities* 59 (1961); 2 Blackstone's *Commentaries* 234 (1866 ed.); 1 Chitty's Criminal Law 11 (5th ed. 1847); Perkins, *The Law of Arrest,* 25 Iowa L. Rev. 201 (1940); Note, *Detention, Arrest, and Salt Lake City Police Practices,* 9 Utah L. Rev. 593, 598 (1965); LaFave, *Arrest* 4 (1965); Tiffany, McIntyre & Rotenberg, *Detection of Crime* 9 (1967); Note, *Philadelphia Police Practices and the Law of Arrest,* 100 U. Pa. L. Rev. 1182, 1186 (1952); American Law Institute, *Restatement, Torts* 2d § 112 (1965).

kind of arrest—with or without a warrant—there must be probable cause.

A limited detention in the course of a police investigation does not contemplate the bringing of an individual into court to answer to specific charges. No warrant of a court would therefore issue for such an investigation. We submit that the Fourth Amendment's requirement that "no Warrant shall issue, but upon probable cause" is not directed to this type of detention—the reason being that such detention is not equivalent to a detention under a warrant. The Fourth Amendment does apply, to be sure, insofar as it guarantees the right of the people to be secure from unreasonable search and seizure of any kind. "The use of the word 'unreasonable,' in this (Fourth) Amendment," Mr. Justice Black has observed, "means, of course, that not *all* searches and seizures are prohibited. Only those which are *unreasonable* are unlawful." Black, *The Bill of Rights,* 35 N.Y.U. L. Rev. 865, 873 (1960) (emphasis in original). See also the comment of Mr. Justice Stewart in *Elkins* v. *United States,* 364 U.S. 206, 222. In our view, both history and the practicalities of current law enforcement support the conclusion that a police officer's power to detain, if carefully exercised in the light of the circumstances, is reasonable and thus consistent with the Fourth Amendment.

B. A LIMITED POWER OF DETENTION FOR LAW ENFORCEMENT PURPOSES HAS HISTORICAL BASIS AND STRONG JUSTIFICATION IN THE NEEDS OF OUR SOCIETY

At the time the Fourth Amendment was adopted, the particular evil which concerned the advocates of

the Bill of Rights was the abuse represented by the general warrant, only recently outlawed in England by case law and statute. *Wilkes* v. *Wood,* Lofft 1, 98 Eng. Rep. 489 (Common Pleas 1763); *Entick* v. *Carrington,* 19 Howell's State Cases 1030 (K.B. 1765); Lasson, *The History and Development of the Fourth Amendment* 48–50 (1937). The Fourth Amendment does, of course, go beyond that particular evil in protecting the people from any unreasonable search and seizure. However, there is no indication that normal law enforcement techniques of the period were regarded as within its prohibitions. We recognize that it is difficult to draw a sharp analogy to conditions existing at the time of the adoption of the Fourth Amendment; modern police departments are a product of the 19th century. However, in England and in the Colonies,[2] there

[2] For example, the right of "watchmen" to stop and detain strangers at nighttime was established by statute in Massachusetts as early as 1658 and continued into the 20th century. See *Massachusetts Colonial Laws 1660–1672*, p. 198 (1889). As reenacted in 1797, "watchmen" were charged with the duty to

> * * * see that all disturbances and disorders in the night shall be prevented and suppressed; and to examine all persons whom they shall see walking abroad in the night after ten o'clock, and whom they have reason to suspect of any unlawful intention or design, of the business abroad at such season, and whither they are going; and in the case they give not reasonable satisfaction therein, then to secure, by imprisonment or otherwise, all such disorderly and suspicious persons, to be safely kept until morning; then to carry them before one of the next Justices of the Peace, to be examined and proceeded against according to the nature of their offenses as is by law provided.

2 Perpetual Laws of Massachusetts 1788–1799, Ch. 82, Sec. 2, p. 410.

A similar system of watchmen prevailed in colonial New York. See Costello, *History of the New York Police* (1885), chapters 2–4.

was a system of watchmen dating back to the Norman kings. The watchmen had a role akin to the peace-keeping functions of a police department.[3]

As pointed out in Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315, 319 (1942), such watchmen were deemed to have the power to detain persons, at least at night, until they could account for their presence. This power was recognized in *Lawrence* v. *Hedger*, 3 Taunt. 13 (Common Pleas 1810), involving an action for false imprisonment by an individual who had been walking through the streets of London at night when stopped by a watchman. The plaintiff was taken by the watchman to a watch-house where the defendant, a parish officer, asked him his name and the reason for carrying his bundle at night. Not satisfied with the replies, the defendant committed plaintiff to prison for the night. The court found for the defendant. Chanbre, J., concurring, found that the suspicion for detaining plaintiff was not groundless, and that "it is highly necessary that they [watchmen] should have such a power of detention * * *. We should be very sorry if the law were otherwise." 3 Taunt at 15. There is no reason to believe that similar authority was not commonly exercised by peace-keeping officers in the colonies.

With growing industrialization and urbanization in the 19th and 20th centuries, the idea of the modern police force took hold—a force expected not only to solve crimes, but also to maintain order and to deter

[3] It was not until 1829 that the first police force was formed in London. 3 Radzinowicz, *A History of English Criminal Law* 109–112 (1948).

their commission. Younger, *Stop and Frisk: Say it Like it is,* 58 J. Cir. L., C. & P.S. 293, 299 (1967); Note, *The Law of Arrest: Constitutionality of Detention and Frisk Acts,* 59 N.W. U. L. Rev. 641, 652 (1965). The power to conduct on-the-spot inquiry is central to the performance of the protective role. As the New York Court of Appeals said in *People* v. *Rivera,* 14 N.Y. 2d 441, 201 N.E. 2d 32, 34; 252 N.Y.S. 2d 458, 461: "Prompt inquiry into suspicious or unusual street action is an indispensible police power in the orderly government of large urban communities."

Mr. Justice Burton, who in his early career served for five years as the mayor of one of our largest cities, stated in similar vein (concurring in *Brinegar* v. *United States,* 338 U.S. 160, 179–180):

> Government agents have duties of crime prevention and crime detection as well as the duty of arresting offenders caught in the commission of a crime or later identified as having committed a crime. The performance of the first duties are as important as the performance of the last. * * *

The indispensability of some authority to detain for purposes of limited inquiry has been universally acknowledged by our courts, including the federal courts, *e.g., Trusty* v. *Oklahoma,* 360 F. 2d 173 (C.A. 10); *Wilson* v. *Porter,* 361 F. 2d 412 (C.A. 9); *Busby* v. *United States,* 296 F. 2d 328 (C.A. 9), certiorari denied, 369 U.S. 876; *United States* v. *Vita,* 294 F. 2d 524 (C.A. 2), certiorari denied, 369 U.S. 823; *Trilling* v. *United States,* 260 F. 2d 677 (C.A. D.C.); *Lee* v. *United States,* 221 F. 2d 29 (C.A.D.C.).

Moreover, it seems appropriate to add that the citizen called upon to respond to such limited inquiry does not suffer the obloquy which may be associated with an arrest. Rather, he is performing the ordinary civic duty, familiar in all organized societies, to provide information in aid of law enforcement. See *Miranda* v. *Arizona*, 384 U.S. 436, 478.

Henry v. *United States*, 361 U.S. 98, is not to the contrary. In that case, the prosecution conceded in the lower courts that an arrest took place when federal agents stopped the car which they were pursuing. That concession was accepted by this Court as the basis of its decision. However, as the Court observed, the government had made clear that it intended to argue in a subsequent case (*Rios* v. *United States*, 364 U.S. 253) that arrests do not necessarily occur each time an individual is detained. 361 U.S. at 103, note 7. In *Rios*, this Court implicitly ruled that *Henry* was not a sweeping decision, eliminating all power on the part of police officers to detain suspects. For if *Henry* had disposed of this issue, there would have been no need in *Rios* to remand for a determination of the precise time that the arrest occurred. See 364 U.S. at 262. In short, detention, as such, is not unreasonable. When the proper circumstances are shown, it may be reasonable and within the ambit of the Fourth Amendment.

C. THE TEST OF THE POWER TO DETAIN MUST BE REASONABLENESS UNDER THE CIRCUMSTANCES

To say that the Fourth Amendment does not, *per se*, condemn a brief detention for investigation is not to argue that the police should be at large or to denigrate

the role of the Amendment. It is to say only that the Fourth Amendment is not an absolute and that its prohibition is aimed at *unreasonable* searches and seizures. The power of limited detention which we support is one which must be carefully circumscribed, and it is the function of the courts, in keeping with their tradition, to confine it within proper bounds—to chart the course between the recognized danger of police abuse on the one hand and the not insignificant danger of police paralysis on the other.

Many attempts have been made to formulate a standard governing a limited form of detention. Terms such as "reasonable cause to investigate",[4] "reasonable grounds to suspect",[5] "reasonable grounds for inquiry",[6] "reasonable suspicion",[7] "founded suspicion"[8] and "circumstances suggestive of the possibility of violation of criminal law"[9] have been proposed or

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[4] Younger, *Stop and Frisk: Say it Like it is*, 58 J. Cr. L., C. & P.S. 293 (1967); *Brinegar* v. *United States* 338 U.S. 160, 179. See also *United States* v. *Vita*, 294 F. 2d 524, 533 (C.A. 2), certiorari denied, 369 U.S. 823; *Trilling* v. *United States*, 260 F. 2d 677, 701.

[5] Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315, 321 (1942); Note, *The Law of Arrest: Constitutionality of Detention and Frisk Acts*, 59 N.W. U. L. Rev. 641, 656 (1965); *Commonwealth* v. *Lehan*, 347 Mass. 194, 197 N.E. 2d 840, 845; *United States* v. *Thomas*, 250 F. Supp. 771, 784 (S.D.N.Y.).

[6] Brief for the United States p. 11, *Rios* v. *United States*, No. 52, O.T., 1960.

[7] N.Y. Code Crim. Proc. 180(a) (McKinney Supp. 1964); Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. Cr. L., C. & P.S. 393, 413 (1963); *Commonwealth* v. *Hicks*, 209 Pa. Super. 1, 223 A. 2d 873, 876; *Wendleboe* v. *Jacobson*, 10 Utah 2d 344, 353 P. 2d 178, 181.

[8] *Wilson* v. *Porter*, 361 F. 2d 412, 415 (C.A. 9).

[9] *State* v. *Hope*, 85 N.J. Super. 551, 205 A. 2d 457. See also, *State* v. *Chronister*, 353 P. 2d 493 (Okla.).

applied. Recognizing the problems encountered in articulating a concept that lies somewhere between probable cause and bare suspicion, the American Law Institute's Draft for a Model Code of Pre-Arraignment Procedure, Section 2.02(2) (1965) has avoided the adoption of a specific term and has proposed a guideline: detention by a law enforcement officer is proper when "a person is observed in circumstances which suggest that he has committed or is about to commit a felony or misdemeanor, and such action is reasonably necessary to enable the officer to determine the lawfulness of that person's conduct * * *." The key word in the definition is "circumstances". The lawfulness of a detention should be considered in the light of the particular circumstances as they confront the responsible persons immediately on the scene. One judge has commented that "[s]weeping generalities ought not to be indulged in, and the focus should be on the facts of the particular case." *United States* v. *Bonanno,* 180 F. Supp. 71, 83 (S.D.N.Y.), reversed on other grounds *sub nom. United States* v. *Bufalino,* 285 F. 2d 408 (C.A. 2). Courts and commentators have suggested a number of factors which should be considered in determining whether a detention is proper. They include the following:

1. The time of day.[10]

[10] *Busby* v. *United States,* 296 F. 2d 328 (C.A. 9), certiorari denied, 369 U.S. 876; *Bell* v. *United States,* 280 F. 2d 717 (C.A.D.C.); *Commonwealth* v. *Lehan,* 347 Mass. 197, 196 N.E. 2d 840; *State* v. *Harris,* 265 Minn. 260, 121 N.W. 2d 327; *Wendleboe* v. *Jacobson,* 10 Utah 2d 344, 353 P. 2d 178; Tiffany, McIntyre and Rotenberg, *Detection of Crime* 19 (1967); *Nicholson* v. *United States,* 355 F. 2d 80 (C.A. 5), certiorari denied, 384 U.S. 974.

2. The place where the suspect is observed.[11]

3. The incidence of crime in the immediate neighborhood.[12]

4. The law enforcement officer's prior knowledge of the suspect.[13]

5. The appearance of the suspect; *i.e.*, whether he resembles someone whom the police are seeking.[14]

6. The pre-detention conduct of the suspect and his companions.[15]

7. The experience of the law enforcement officer.[16]

8. The seriousness of the suspected offense.[17]

9. The necessity for immediate investigative activity.[18]

See, generally, Tiffany, McIntyre and Rotenberg, *Detection of Crime*, ch. 2 (1967); *Arnold* v. *United States*, 382 F. 2d 4, 7 (C.A. 9).

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[11] *State* v. *Freeland*, 255 Iowa 1334, 125 N.W. 2d 825.

[12] *Ellis* v. *United States*, 264 F. 2d 372 (C.A.D.C.), certiorari denied, 359 U.S. 998; *Commonwealth* v. *Lehan*, *supra*, note 10; *State* v. *Chronister*, 353 P. 2d 493 (Okla); *Trusty* v. *Oklahoma*, 360 F. 2d 173 (C.A. 10).

[13] *Commonwealth* v. *Lehan*, (*ibid.*), *State* v. *Chronister*, (*ibid.*); *Brinegar* v. *United States*, 338 U.S. 160, 170.

[14] *Gilbert* v. *United States*, 366 F. 2d 923 (C.A. 9), certiorari denied, 388 U.S. 922; *Ellis* v. *United States*, *supra*, note 12; *Goldsmith* v. *United States*, 277 F. 2d 335 (C.A.D.C.), certiorari denied *sub nom. Carter* v. *United States*, 364 U.S. 863; *Rodgers* v. *United States*, 362 F. 2d 358 (C.A. 8).

[15] *Wilson* v. *Porter*, 361 F. 2d 412, 414 (C.A. 9); *United States* v. *Katz*, 238 F. Supp. 689 (S.D.N.Y.); *United States* v. *Thomas*, 250 F. Supp. 771, 775 (S.D.N.Y.); *State* v. *Terry*, 5 Ohio App. 2d 122, 214 N.E. 2d 114.

[16] *State* v. *Terry*, (*ibid.*); *United States* v. *Thomas*, 250 F. Supp. 771, 785 (S.D.N.Y.).

[17] *Lee* v. *United States*, 221 F. 2d 29, 30 (C.A.D.C.); *United States* v. *Bonanno*, *supra*, page 11.

[18] *United States* v. *Bonanno*, (*ibid.*).

The sum total of all the suggestions brings one back to the terms of the Fourth Amendment itself—a protection against "unreasonable" searches and seizures. What is reasonable or "unreasonable" must necessarily vary with differing times and differing situations.

Similarly, it is impossible to define with exactitude the permissible extent of a detention not amounting to an arrest. Once more, we submit, the constitutional standard must be one of reasonableness under the circumstances. When the suspected offense is not serious and a modicum of essential information (*e.g.*, the suspect's identity and address) has been obtained, so that the police would suffer little more than inconvenience if the citizen were permitted to go his way, it is reasonable to restrict the allowable period of the detention to very narrow limits. Conversely, where the person is unknown to the police, the offense under investigation is serious, and the suspect's explanation is equivocal, a detention for a somewhat longer (though not protracted) period would seem proper, at least where the questioning is on the scene.[19]

The duty imposed upon policemen by society to investigate and deter crime requires that they be allowed to question individuals whom they have reasonably stopped. *Trilling* v. *United States*, 260 F. 2d 677, 701 (C.A.D.C.). This Court, in *Miranda* v. *Arizona*, 384

[19] A discussion of the time limits stated in various statutes lasting from twenty minutes (Draft for a Model Code of Pre-Arraignment Procedure) to four hours (New Hampshire Laws Sec. 595:2) would, for our purposes, be of no import. We agree with the First Circuit that a State's statutory time provision does not, *ipso facto*, create a constitutional standard. *Hancock* v. *Nelson*, 363 F. 2d 249 (C.A. 1).

U.S. 436, enunciated certain procedural safeguards to be employed "when an individual is taken into custody or otherwise deprived of his freedom by the authorities * * * and is subjected to questioning." 384 U.S. at 478. At the same time, the right of policemen to conduct "[g]eneral on-the-scene questioning of citizens" was noted, this Court stating that responsible citizenship required citizens to give whatever information they may have to aid in law enforcement. 384 U.S. at 477–478. It appears, therefore, that the Court, in *Miranda,* did not consider an on-the-street detention based upon reasonable suspicion to constitute "custodial interrogation", thereby requiring the officer to inform the suspect of his rights to silence and counsel. 384 U.S. at 477. See *Brown* v. *United States,* 365 F. 2d 976, 979 (C.A.D.C.); *United States* v. *Davis,* 259 F. Supp. 496 (D. Mass.). Perhaps, an admonition should be required when the questioning becomes sustained and moves from what might be termed preliminary investigation to a focus on the individual as a criminal. We believe, however, that in the usual type of street investigation *Miranda* does not apply. We assume that a refusal to respond to a policeman's questions is a neutral act and will not establish probable cause to arrest where it would otherwise be lacking, *United States* v. *Vita,* 294 F. 2d 524, 531 (C.A. 2), certiorari denied, 369 U.S. 823; see *United States* v. *Bonanno, supra,* 180 F. Supp. at 76; cf. Perkins, *The Law of Arrest,* 25 Iowa L. Rev. 201, 259 (1940). This does not, however, seem to us to require a

Miranda-type warning every time a policeman asks a question.[20]

II. A POLICE OFFICER CAN LAWFULLY "FRISK" A SUSPECT WHEN THE CIRCUMSTANCES ARE SUCH THAT HE REASONABLY APPREHENDS DANGER FROM A HIDDEN WEAPON

In keeping with our view that the question at issue here is reasonableness under the Fourth Amendment, we think it unimportant whether a frisk is denominated a search; rather, the question is whether, even assuming that it is a search, it is reasonable. In our view, when a person is lawfully detained for questioning (albeit on less than probable cause), a police officer is warranted in patting down the outer clothing of the suspect if the circumstances are such that he reasonably apprehends that the person detained may have a dangerous weapon at hand.

In those limited circumstances, we think a frisk can be deemed a reasonable search under the Fourth Amendment. The invasion of privacy or interference with liberty is slight.[21] Moreover, the detention which occasioned the frisk must be based on the founded

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[20] Whether other acts on the part of the detained suspect—such as seeking to avoid the detention, giving obviously false answers, or displaying objects of potential use for criminal purposes—would justify a formal arrest must necessarily be determined in the context of a particular situation. The sum total of the circumstances arising after the detention has occurred, when combined with the factors existing at the time of the detention, may create probable cause for such an arrest. *Brinegar* v. *United States*, 338 U.S. 160; *Rios* v. *United States*, 364 U.S. 253.

[21] Compare the statement in *Camara* v. *Municipal Court*, 387 U.S. 523, 536–537, that "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails."

suspicion that the individual might be, or has been, involved in a serious act. The justification of the frisk itself is to protect the officer acting in pursuit of his lawful duties. In our day, when the size of a weapon has no relationship to the harm it can inflict, the need of the police for such protection is substantial, as numerous judges and commentators have recognized. *State* v. *Moore,* 187 A. 2d 807 (Del.); *Commonwealth* v. *Hicks,* 209 Pa. Super. 1, 223 A. 2d 873; Leagre, *The Fourth Amendment and the Law of Arrest,* 54 J. Cr. L., C. & P.S. 393, 419 (1963); Warner, *The Uniform Arrest Act,* 28 Va. L. Rev. 315, 324 (1942); Younger, *Stop and Frisk: Say it Like it Is,* 58 J. Cr. L., C. & P.S. 293 (1967).

Opponents of stop-and-frisk authority stress the possibilities of abuse. We do not minimize that danger, although we note that this is inevitably true of almost all police procedures, and, perhaps, as Lord Acton suggested, of almost all exercises of authority by the State. The reconciliation of the need for the power and the danger of its abuse must be found in the development of rules and practices which fix sensible limits and in the diligent supervision of the courts.

We urge no right to search a person for contraband when he is detained on less than probable cause. However, when the type of frisk which we regard as lawful—a patting down for weapons—does reveal the existence of weapons, we see no sound reason why the weapon so discovered may not be introduced in evidence or provide the basis of a prosecution. At the moment the peace officer uncovers, pursuant to a frisk,

an item which the suspect unlawfully possesses, a crime is being committed in the officer's presence. It would be irrational to prohibit prosecution of that offense, merely because in the first instance the suspect was detained—lawfully—on less than probable cause. Police have the responsibility to detect crime. If the means of detection are not unconstitutional, there is no reason to construct an exclusionary rule to benefit the suspect who has been discovered committing a criminal offense in the presence of a police officer. The interests of society are not adequately served merely by removing the dangerous weapon from the suspect's person and sending him on his way.

In cases where searches and seizures have been held violative of the Constitution, the subject matter discovered by the illegal procedure has been excluded from evidence in order to deter the police from resorting to illegal methods. *Weeks* v. *United States,* 232 U.S. 383; *Mapp* v. *Ohio,* 367 U.S. 643. A similar exclusionary rule would manifestly be inappropriate for items uncovered by *lawful* frisks. On the contrary, the customary rules of evidence should govern, and such evidence, if otherwise admissible, should be received.

Nor is there any reason to restrict the admissibility of evidence obtained from frisks to weapons so long as the frisk had a legitimate purpose and was not a mere excuse to search the person on less than probable cause. Once more, meaningful reference can be made to situations involving evidence seized in a lawful search based upon probable cause or incident to an arrest. If a frisk has been properly conducted and found to be legally justifiable, the mere fact that the

expectations of an officer seeking a dangerous weapon were not realized, and that a suspect's covered pocket concealed some other unlawfully possessed object, should not prevent the officer from removing what he has found. *Harris* v. *United States,* 331 U.S. 145, 155; *Abel* v. *United States,* 362 U.S. 217, 238.

In sum, we believe that it is consistent with the Fourth Amendment to recognize a power in law enforcement officers to detain and question under circumstances amounting to less than probable cause for a formal arrest, and that, in exercising such power, the officer may legitimately protect himself by a frisk for dangerous weapons.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

No. 67.—October Term, 1967.

John W. Terry, Petitioner, v. State of Ohio.	On Writ of Certiorari to the Supreme Court of Ohio.

[June 10, 1968.]

Mr. Chief Justice Warren delivered the opinion of the Court.

This case presents serious questions concerning the role of the Fourth Amendment in the confrontation on the street between the citizen and the policeman investigating suspicious circumstances.

Petitioner Terry was convicted of carrying a concealed weapon and sentenced to the statutorily prescribed term of one to three years in the penitentiary.[1] Following the denial of a pretrial motion to suppress, the prosecution introduced in evidence two revolvers and a number of bullets seized from Terry and a codefendant, Richard Chilton,[2] by Cleveland Police Detective Martin

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[1] Ohio Rev. Code § 2923.01 (1953) provides in part that "No person shall carry a pistol, bowie knife, dirk, or other dangerous weapon concealed on or about his person." An exception is made for properly authorized law enforcement officers.

[2] Terry and Chilton were arrested, indicted, tried, and convicted together. They were represented by the same attorney, and they made a joint motion to suppress the guns. After the motion was denied, evidence was taken in the case against Chilton. This evidence consisted of the testimony of the arresting officer and of Chilton. It was then stipulated that this testimony would be applied to the case against Terry, and no further evidence was introduced in that case. The trial judge considered the two cases together, rendered the decisions at the same time and sentenced the two men at the same time. They prosecuted their state court appeals together

McFadden. At the hearing on the motion to suppress this evidence, Officer McFadden testified that while he was patrolling in plain clothes in downtown Cleveland at approximately 2:30 in the afternoon of October 31, 1963, his attention was attracted by two men, Chilton and Terry, standing on the corner of Huron Road and Euclid Avenue. He had never seen the two men before, and he was unable to say precisely what first drew his eye to them. However, he testified that he had been a policemen for 39 years and a detective for 35 and that he had been assigned to patrol this vicinity of downtown Cleveland for shoplifters and pickpockets for 30 years. He explained that he had developed routine habits of observation over the years and that he would "stand and watch people or walk and watch people at many intervals of the day." He added: "Now, in this case when I looked over they didn't look right to me at the time."

His interest aroused, Officer McFadden took up a post of observation in the entrance to a store 300 to 400 feet away from the two men. "I get more purpose to watch them when I seen their movements," he testified. He saw one of the men leave the other one and walk southwest on Huron Road, past some stores. The man paused for a moment and looked in a store window, then walked on a short distance, turned around and walked back toward the corner, pausing once again to look in the same store window. He rejoined his companion at the corner, and the two conferred briefly. Then the second man went through the same series of motions, strolling down Huron Road, looking in the same window, walking on a short distance, turning back, peering in the store window again, and returning to confer with the first man at the

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through the same attorney, and they petitioned this Court for certiorari together. Following the grant of the writ upon this joint petition, Chilton died. Thus, only Terry's conviction is here for review.

corner. The two men repeated this ritual alternately between five and six times apiece—in all, roughly a dozen trips. At one point, while the two were standing together on the corner, a third man approached them and engaged them briefly in conversation. This man then left the two others and walked west on Euclid Avenue. Chilton and Terry resumed their measured pacing, peering, and conferring. After this had gone on for 10 to 12 minutes, the two men walked off together, heading west on Euclid Avenue, following the path taken earlier by the third man.

By this time Officer McFadden had become thoroughly suspicious. He testified that after observing their elaborately casual and oft-repeated reconnaissance of the store window on Huron Road, he suspected the two men of "casing a job, a stick-up," and that he considered it his duty as a police officer to investigate further. He added that he feared "they may have a gun." Thus, Officer McFadden followed Chilton and Terry and saw them stop in front of Zucker's store to talk to the same man who had conferred with them earlier on the street corner. Deciding that the situation was ripe for direct action, Officer McFadden approach the three men, identified himself as a police officer and asked for their names. At this point his knowledge was confined to what he had observed. He was not acquainted with any of the three men by name or by sight, and he had received no information concerning them from any other source. When the men "mumbled something" in response to his inquiries, Officer McFadden grabbed petitioner Terry, spun him around so that they were facing the other two, with Terry between McFadden and the others, and patted down the outside of his clothing. In the left breast pocket of Terry's overcoat Officer McFadden felt a pistol. He reached inside the overcoat pocket, but was unable to remove the gun. At this point, keeping Terry

between himself and the others, the officer ordered all three men to enter Zucker's store. As they went in, he removed Terry's overcoat completely, retrieved a .38 caliber revolver from the pocket and ordered all three men to face the wall with their hands raised. Officer McFadden proceeded to pat down the outer clothing of Chilton and the third man, Katz. He discovered another revolver in the outer pocket of Chilton's overcoat, but no weapons were found on Katz. The officer testified that he only patted the men down to see whether they had weapons, and that he did not put his hands beneath the outer garments of either Terry or Chilton until he felt their guns. So far as appears from the record, he never placed his hands beneath Katz's outer garments. Officer McFadden seized Chilton's gun, asked the proprietor of the store to call a police wagon, and took all three men to the station, where Chilton and Terry were formally charged with carrying concealed weapons.

On the motion to suppress the guns the prosecution took the position that they had been seized following a search incident to a lawful arrest. The trial court rejected this theory, stating that it "would be stretching the facts beyond reasonable comprehension" to find that Officer McFadden had had probable cause to arrest the men before he patted them down for weapons. However, the court denied the defendant's motion on the ground that Officer McFadden, on the basis of his experience, "had reasonable cause to believe . . . that the defendants were conducting themselves suspiciously, and some interrogation should be made of their action." Purely for his own protection, the court held, the officer had the right to pat down the outer clothing of these men, whom he had reasonable cause to believe might be armed. The court distinguished between an investigatory "stop" and an arrest, and between a "frisk" of the outer clothing for weapons and a full-blown search for evidence of crime.

The frisk, it held, was essential to the proper performance of the officer's investigatory duties, for without it "the answer to the police officer may be a bullet, and a loaded pistol discovered during the frisk is admissible."

After the court denied their motion to suppress, Chilton and Terry waived jury trial and pleaded not guilty. The court adjudged them guilty, and the Court of Appeals for the Eighth Judicial District, Cuyahoga County, affirmed. *State* v. *Terry*, 5 Ohio App. 2d 122, 214 N. E. 2d 114 (1966). The Supreme Court of Ohio dismissed petitioner's appeal on the ground that no "substantial constitutional question" was involved. We granted certiorari, 387 U. S. 929 (1967), to determine whether the admission of the revolvers in evidence violated petitioner's rights under the Fourth Amendment, made applicable to the States by the Fourthteenth. *Mapp* v. Ohio, 367 U. S. 643 (1961). We affirm the conviction.

I.

The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." This inestimable right of personal security belongs as much to the citizen on the streets of our great cities as to the homeowner closeted in his study to dispose of his secret affairs. For as this Court has always recognized,

> "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference, unless by clear and unquestionable authority of law." *Union Pac. R. Co.* v. *Botsford*, 141 U. S. 250, 251 (1891).

We have recently held that "the Fourth Amendment protects people, not places," *Katz* v. *United States*, 389 U. S.

347, 351 (1967), and wherever an individual may harbor a reasonable "expectation of privacy," *id.*, at 361 (MR. JUSTICE HARLAN, concurring), he is entitled to be free from unreasonable governmental intrusion. Of course, the specific content and incidents of this right must be shaped by the context in which it is asserted. For "what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures." *Elkins* v. *United States*, 364 U. S. 206, 222 (1960). Unquestionably petitioner was entitled to the protection of the Fourth Amendment as he walked down the street in Cleveland. *Beck* v. *Ohio*, 379 U. S. 89 (1964); *Rios* v. *United States*, 364 U. S. 253 (1960); *Henry* v. *United States*, 361 U. S. 98 (1959); *United States* v. *Di Re*, 332 U. S. 581 (1948); *Carroll* v. *United States*, 267 U. S. 132 (1925). The question is whether in all the circumstances of this on-the-street encounter, his right to personal security was violated by an unreasonable search and seizure.

We would be less than candid if we did not acknowledge that this question thrusts to the fore difficult and troublesome issues regarding a sensitive area of police activity—issues which have never before been squarely presented to this Court. Reflective of the tensions involved are the practical and constitutional arguments pressed with great vigor on both sides of the public debate over the power of the police to "stop and frisk"—as it is sometimes euphemistically termed—suspicious persons.

On the one hand, it is frequently argued that in dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess. For this purpose it is urged that distinctions should be made between a "stop" and an "arrest" (or a "seizure" of a person), and

between a "frisk" and a "search." [3] Thus, it is argued, the police should be allowed to "stop" a person and detain him briefly for questioning upon suspicion that he may be connected with criminal activity. Upon suspicion that the person may be armed, the police should have the power to "frisk" him for weapons. If the "stop" and the "frisk" give rise to probable cause to believe that the suspect has committed a crime, then the police should be empowered to make a formal "arrest," and a full incident "search" of the person. This scheme is justified in part upon the notion that a "stop" and a "frisk" amount to a mere "minor inconvenience and petty indignity," [4] which can properly be imposed upon the citizen in the interest of effective law enforcement on the basis of a police officer's suspicion.[5]

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[3] Both the trial court and the Ohio Court of Appeals in this case relied upon such a distinction. *State* v. *Terry*, 5 Ohio App. 2d 122, 125–130, 214 N. E. 2d 114, 117–120 (1966). See also, *e. g.*, *People* v. *Rivera*, 14 N. Y. 2d 441, 201 N. E. 2d 32, 252 N. Y. S. 2d 458 (1964), cert. denied, 379 U. S. 978 (1955); Aspen, Arrest and Arrest Alternatives: Recent Trends, 1966 U. Ill. L. F. 241, 249–254; Warner, The Uniform Arrest Act, 28 Va. L. Rev. 315 (1942); Note, Stop and Frisk in California, 18 Hastings L. J. 623, 629–632 (1967).

[4] *People* v. *Rivera*, *supra*, n. 3, at 447, 201 N. E. 2d, at 36, 252 N. Y. S. 2d, at 464.

[5] The theory is well laid out in the *Rivera* opinion:

"... [T]he evidence needed to make the inquiry is not of the same degree or conclusivenss as that required for an arrest. The stopping of the individual to inquire is not an arrest and the ground upon which the police may make the inquiry may be less incriminating than the ground for an arrest for a crime known to have been committed. . . .

"And as the right to stop and inquire is to be justified for a cause less conclusive than that which would sustain an arrest, so the right to frisk may be justified as an incident to inquiry upon grounds of elemental safety and precaution which might not initially sustain a search. Ultimately the validity of the frisk narrows down to whether there is or is not a right by the police to touch

On the other side the argument is made that the authority of the police must be strictly circumscribed by the law of arrest and search as it has developed to date in the traditional jurisprudence of the Fourth Amendment.[6] It is contended with some force that there is not—and cannot be—a variety of police activity which does not depend solely upon the voluntary cooperation of the citizen and yet which stops short of an arrest based upon probable cause to make such an arrest. The heart of the Fourth Amendment, the argument runs, is a severe requirement of specific justification for any intrusion upon protected personal security, coupled with a highly developed system of judicial controls to enforce upon the agents of the State the commands of the Constitution. Acquiescence by the courts in the compulsion inherent in the field interrogation practices at issue here, it is urged, would constitute an abdication of judicial control over, and indeed an encouragement of, substantial interference with liberty and personal security by police officers whose judgment is necessarily colored by their primary involvement in "the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U. S. 10, 14 (1948). This, it is argued, can only serve to exacerbate police-community tensions in the crowded centers of our Nation's cities.[7]

In this context we approach the issues in this case mindful of the limitations of the judicial function in controlling the myriad daily situations in which police

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the person questioned. The sense of exterior touch here involved is not very far different from the sense of sight or hearing—senses upon which police cusomarily act." *People* v. *Rivera*, 14 N. Y. 2d 441, 445, 447, 201 N. E. 2d 32, 34, 35, 252 N. Y. S. 2d 458, 461, 463 (1964); cert. denied, 379 U. S. 978 (1965).

[6] See, *e. g.*, Foote, The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?, 51 J. Crim. L. C. & P. S. 402 (1960).

[7] See n. 11, *infra*.

men and citizens confront each other on the street. The State has characterized the issue here as "the right of a police officer . . . to make an on-the-street stop, interrogate and pat down for weapons (known in the street vernacular as 'stop and frisk')." [8] But this is only partly accurate. For the issue is not the abstract propriety of the police conduct, but the admissibiilty against petitioner of the evidence uncovered by the search and seizure. Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct. See *Weeks* v. *United States,* 232 U. S. 383, 391–393 (1914). Thus its major thrust is a deterrent one, see *Linkletter* v. *Walker,* 381 U. S. 618, 629–635 (1965), and experience has taught that it is the only effective deterrent to police misconduct in the criminal context, and that without it the constitutional guarantee against unreasonable searches and seizures would be a mere "form of words." *Mapp* v. *Ohio,* 367 U. S. 643, 655 (1961). The rule also serves another vital function—"the imperative of judicial integrity." *Elkins* v. *United States,* 364 U. S. 206, 222 (1960). Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. Thus in our system evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.

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[8] Brief for Respondent, p. 2.

The exclusionary rule has its limitations, however, as a tool of judicial control. It cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections. Moreover, in some contexts the rule is ineffective as a deterrent. Street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life. Moreover, hostile confrontations are not all of a piece. Some of them begin in a friendly enough manner, only to take a different turn upon the injection of some unexpected element into the conversation. Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime.[9] Doubtless some police "field interrogation" conduct violates the Fourth Amendment. But a stern refusal by this Court to condone such activity does not necessarily render it responsive to the exclusionary rule. Regardless of how effective the rule may be where obtaining convictions is an impor-

[9] See Tiffany, McIntyre & Rotenberg, Detection of Crime: Stopping and Questioning, Search and Seizure, Encouragement and Entrapment 18–56 (1967). This sort of police conduct may, for example, be designed simply to help an intoxicated person find his way home, with no intention of arresting him unless he becomes obstreperous. Or the police may be seeking to mediate a domestic quarrel which threatens to erupt into violence. They may accost a woman in an area known for prostitution as part of a harassment campaign designed to drive prostitutes away without the considerable difficulty involved in prosecuting them. Or they may be conducting a dragnet search of all teenagers in a particular section of the city for weapons because they have heard rumors of an impending gang fight.

tant objective of the police,[10] it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal.

Proper adjudication of cases in which the exclusionary rule is invoked demands a constant awareness of these limitations. The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain,[11] will not be stopped by the exclusion of any evidence from any criminal trial. Yet a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to

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[10] See Tiffany, McIntyre & Rotenberg, *supra*, n. 9, at 100–101; Note, 47 Nw. U. L. Rev. 493, 497–499 (1952).

[11] The President's Commission on Law Enforcement and Administration of Justice found that "in many communities, field interrogations are a major source of friction between the police and minority groups." President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police 183 (1967). It was reported that the friction caused by "misuse of field interrogations" increases "as more police departments adopt 'aggressive patrol' in which officers are encouraged routinely to stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident." *Id.*, at 184. While the frequency with which "frisking" forms a part of field interrogation practice varies tremendously with the locale, the objective of the interrogation, and the particular officer, see Tiffany, McIntyre & Rotenberg, *supra*, n. 9, at 47–48, it cannot help but be a severely exacerbating factor in police-community tensions. This is particularly true in situations where the "stop and frisk" of youths or minority group members is "motivated by the officers' perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets." *Id.*, at 47–48.

prevent crime. No judicial opinion can comprehend the protean variety of the street encounter, and we can only judge the facts of the case before us. Nothing we say today is to be taken as indicating approval of police conduct outside the legitimate investigative sphere. Under our decision, courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials. And, of course, our approval of legitimate and restrained investigative conduct undertaken on the basis of ample factual justification should in no way discourage the employment of other remedies than the exclusionary rule to curtail abuses for which that sanction may prove inappropriate.

Having thus roughly sketched the perimeters of the constitutional debate over the limits on police investigative conduct in general and the background against which this case presents itself, we turn our attention to the quite narrow question posed by the facts before us: whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest. Given the narrowness of this question, we have no occasion to canvass in detail the constitutional limitations upon the scope of a policeman's power when he confronts a citizen without probable cause to arrest him.

II.

Our first task is to establish at what point in this encounter the Fourth Amendment becomes relevant. That is, we must decide whether and when Officer McFadden "seized" Terry and whether and when he con-

ducted a "search." There is some suggestion in the use of such terms as "stop" and "frisk" that such police conduct is outside the purview of the Fourth Amendment because neither action rises to the level of a "search" or "seizure" within the meaning of the Constitution.[12] We emphatically reject this notion. It is quite plain that the Fourth Amendment governs "seizures" of the person which do not eventuate in a trip to the station house and prosecution for crime—"arrests" in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search." Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." [13] It is a serious intrusion upon the sanctity of the person, which may inflict great

[12] In this case, for example, the Ohio Court of Appeals stated that "we must be careful to distinguish that the 'frisk' authorized herein includes only a 'frisk' for a dangerous weapon. It by no means authorizes a search for contraband, evidentiary material, or anything else in the absence of reasonable grounds to arrest. Such a search is controlled by the Fourth Amendment and probable cause is essential." *State* v. *Terry*, 5 Ohio App. 2d 122, —, 214 N. E. 2d 114, — (1966). See also, *e. g.*, *Ellis* v. *United States*, 264 F. 2d 372, 374 (C. A. D. C. Cir. 1959); Note, 65 Col. L. Rev. 848, 860 & n. 81 (1965).

[13] Consider the following apt description:

"[T]he officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet." Priar & Martin, Searching and Disarming Criminals, 45 J. Crim. L. C. & P. S. 481 (1954).

indignity and arouse strong resentment, and it is not to be undertaken lightly.[14]

The danger in the logic which proceeds upon distinctions between a "stop" and an "arrest," or "seizure" of the person, and between a "frisk" and a "search" is twofold. It seeks to isolate from constitutional scrutiny the initial stages of the contact beween the policeman and the citizen. And by suggesting a rigid all-or-nothing model of justification and regulation under the Amendment, it obscures the utility of limitations upon the scope, as well as the initiation, of police action as a means of constitutional regulation.[15] This Court has held in

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[14] See n. 11, *supra*, and accompanying text:

We have noted that the abusive practices which play a major, though by no means exclusive, role in creating this friction are not susceptible of control by means of the exclusionary rule, and cannot properly dictate our decision with respect to the powers of the police in genuine investigative and preventive situations. However, the degree of community resentment aroused by particular practices is clearly relevant to an assessment of the quality of the intrusion upon reasonable expectations of personal security caused by those practices.

[15] These dangers are illustrated in part by the course of adjudication in the Court of Appeals of New York. Although its first decision in this area, *People* v. *Rivera*, 14 N. Y. 2d 441, 201 N. E. 2d 32, 252 N. Y. S. 2d 458 (1964), cert. denied, 379 U. S. 978 (1965), rested squarely on the notion that a "frisk" was not a "search," see nn. 3–5, *supra*, it was compelled to recognize in *People* v. *Taggart*, 20 N. Y. 2d 335, 342, — N. E. 2d —, —, — N. Y. S. 2d —, — (1967), that what it had actually authorized in *Rivera* and subsequent decisions, see, *e. g.*, *People* v. *Pugach*, 15 N. Y. 2d 65, 204 N. E. 2d 176, 255 N. Y. S. 2d 833 (1964), cert. denied, 380 U. S. 936 (1965), was a "search" upon less than probable cause. However, in acknowledging that no valid distinction could be maintained on the basis of its cases, the Court of Appeals continued to distinguish between the two in theory. It still defined "search" as it had in *Rivera*—as an essentially unlimited examination of the person for any and all seizable items—and merely noted that the cases had upheld police intrusions which went far beyond the original limited

the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope. *Kremen* v. *United States*, 353 U. S. 346 (1957); *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 356–358 (1931); see *United States* v. *Di Re*, 332 U. S. 581, 586–587 (1948). The scope of the search must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible. *Warden* v. *Hayden*, 387 U. S. 294, 310 (1967) (MR. JUSTICE FORTAS, concurring); see, *e. g.*, *Preston* v. *United States*, 376 U. S. 364, 367–368 (1964); *Agnello* v. *United States*, 269 U. S. 20, 30–31 (1926).

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conception of a "frisk." Thus, principally because it failed to consider limitations upon the scope of searches in indivdual cases as a potential mode of regulation, the Court of Appeals in three short years arrived at the position that the Constitution must, in the name of necessity, be held to permit unrestrained rummaging about a person and his effects upon mere suspicion. It did apparently limit its holding to "cases involving serious personal injury or grave irreparable property damage," thus excluding those involving "the enforcement of sumptuary laws, such as gambling, and laws of limited public consequence, such as narcotics violations, prostitution, larcenies of the ordinary kind, and the like." *People* v. *Taggart*, *supra*, at 340, — N. E. 2d, at —, — N. Y. S. 2d, at —.

In our view the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness. Cf. *Brinegar* v. *United States*, 338 U. S. 160, 183 (1949) (Mr. Justice Jackson, dissenting). Compare *Camara* v. *Municipal Court*, 387 U. S. 523, 537 (1967). This seems preferable to an approach which attributes too much significance to an overly technical definition of "search," and which turns in part upon a judge-made hierarchy of legislative enactments in the criminal sphere. Focusing the inquiry squarely on the dangers and demands of the particular situation also seems more likely to produce rules which are intelligible to the police and the public alike than requiring the officer in the heat of an unfolding encounter on the street to make a judgment as to which laws are "of limited public consequence."

The distinctions of classical "stop-and-frisk" theory thus serve to divert attention from the central inquiry under the Fourth Amendment—the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security. "Search" and "seizure" are not talismans. We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a "technical arrest" or a "full-blown search."

In this case there can be no question, then, that Officer McFadden "seized" petitioner and subjected him to a "search" when he took hold of him and patted down the outer surfaces of his clothing. We must decide whether at that point it was reasonable for Officer McFadden to have interfered with petitioner's personal security as he did.[16] And in determining whether the seizure and search were "unreasonable" our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.

III.

If this case involved police conduct subject to the Warrant Clause of the Fourth Amendment, we would

[16] We thus decide nothing today concerning the constitutional propriety of an investigative "seizure" upon less than probable cause for purposes of "detention" and/or interrogation. Obviously, not all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred. We cannot tell with any certainty upon this record whether any such "seizure" took place here prior to Officer McFadden's initiation of physical contact for purposes of searching Terry for weapons, and we thus may assume that up to that point no intrusion upon constitutionally protected rights had occurred.

have to ascertain whether "probable cause" existed to justify the search and seizure which took place. However, that is not the case. We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure, see, *e. g.*, *Katz* v. *United States*, 389 U. S. 347 (1967); *Beck* v. *Ohio*, 379 U. S. 89, 96 (1964); *Chapman* v. *United States*, 365 U. S. 610 (1961), or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances, see, *e. g.*, *Warden* v. *Hayden*, 387 U. S. 294 (1967) (hot pursuit); cf. *Preston* v. *United States*, 376 U. S. 364, 367–368 (1964). But we deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures.[17]

Nonetheless, the notions which underlie both the warrant procedure and the requirement of probable cause remain fully relevant in this context. In order to assess the reasonableness of Officer McFadden's conduct as a general proposition, it is necessary "first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen," for there is "no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails." *Camara* v. *Municipal Court*, 387 U. S. 523, 534, 536–537 (1967). And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which,

[17] See generally, Leagre, The Fourth Amendment and the Law of Arrest, 54 J. Crim. L. C. and P. S. 393, 396–403 (1963).

taken together with rational inferences from those facts, reasonably warrant that intrusion.[18] The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.[19] And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate? Cf. *Carroll* v. *United States*, 267 U. S. 132 (1925); *Beck* v. *Ohio*, 379 U. S. 89, 96–97 (1964).[20] Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to

[18] This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence. See *Beck* v. *Ohio*, 379 U. S. 89, 96–97 (1964); *Ker* v. *California*, 374 U. S. 23, 34–37 (1963); *Wong Sun* v. *United States*, 371 U. S. 471, 479–484 (1963); *Rios* v. *United States*, 364 U. S. 253, 261–262 (1960); *Henry* v. *United States*, 361 U. S. 98, 100–102 (1959); *Draper* v. *United States*, 358 U. S. 307, 312–314 (1959); *Brinegar* v. *United States*, 338 U. S. 160, 175–178 (1949); *Johnson* v. *United States*, 333 U. S. 10, 15–17 (1948); *United States* v. *Di Re*, 332 U. S. 581, 593–595 (1948); *Husty* v. *United States*, 282 U. S. 694, 700–701 (1931); *Dumbra* v. *United States*, 268 U. S. 435, 441 (1925); *Carroll* v. *United States*, 267 U. S. 132, 159–162 (1925); *Stacey* v. *Emery*, 97 U. S. 642, 645 (1878).

[19] See, *e. g.*, *Katz* v. *United States*, 389 U. S. 347, 354–357 (1967); *Berger* v. *New York*, 388 U. S. 41, 54–60 (1967); *Johnson* v. *United States*, 333 U. S. 10, 13–15 (1948); cf. *Wong Sun* v. *United States*, 371 U. S. 471, 479–480 (1963). See also *Aguilar v. Texas*, 378 U. S. 108, 110–115 (1964).

[20] See also cases cited in n. 18, *supra*.

sanction. See, *e. g., Beck* v. *Ohio, supra; Rios* v. *United States,* 364 U. S. 253 (1960); *Henry* v. *United States,* 361 U. S. 98 (1959). And simple "'good faith on the part of the arresting officer is not enough.' . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." *Beck* v. *Ohio, supra,* at 97.

Applying these principles to this case, we consider first the nature and extent of the governmental interests involved. One general interest is of course that of effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest. It was this legitimate investigative function Officer McFadden was discharging when he decided to approach petitioner and his companions. He had observed Terry, Chilton, and Katz go through a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation. There is nothing unusual in two men standing together on a street corner, perhaps waiting for someone. Nor is there anything suspicious about people in such circumstances strolling up and down the street, singly or in pairs. Store windows, moreover, are made to be looked in. But the story is quite different where, as here, two men hover about a street corner for an extended period of time, at the end of which it becomes apparent that they are not waiting for anyone or anything; where these men pace alternately along an identical route, pausing to stare in the same store window roughly 24 times; where each completion of this route is

followed immediately by a conference between the two men on the corner; where they are joined in one of these conferences by a third man who leaves swiftly; and where the two men finally follow the third and rejoin him a couple of blocks away. It would have been poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further.

The crux of this case, however, is not the propriety of Officer McFadden's taking steps to investigate petitioner's suspicious behavior, but rather, whether there was justification for McFadden's invasion of Terry's personal security by searching him for weapons in the course of that investigation. We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded. Virtually all of these deaths and a substantial portion of the injuries are inflicted with guns and knives.[21]

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[21] Fifty-seven law enforcement officers were killed in the line of duty in this country in 1966, bringing the total to 335 for the seven-year period beginning with 1960. Also in 1966, there were 23,851 assaults on police officers, 9,113 of which resulted in injuries to the policemen. Fifty-five of the 57 officers killed in 1966 died from gunshot wounds, 41 of them inflicted by handguns easily secreted about the person. The remaining two murders were perpetrated by knives. See Federal Bureau of Investigation, Uniform

In view of these facts, we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

We must still consider, however, the nature and quality of the intrusion on individual rights which must be acepted if police officers are to be conceded the right to search for weapons in situations where probable cause to arrest for crime is lacking. Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience. Petitioner contends that such an intrusion is permissible only incident to a lawful arrest, either for a crime involving the possession of weapons or for a crime the commission of which led the officer to investigate in the first place. However, this argument must be closely examined.

Crime Reports for the United States—1966, at 45–48, 152 and Table 51.

The easy availability of firearms to potential criminals in this country is well known and has provoked much debate. See, *e. g.*, President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 239–243 (1967). Whatever the merits of gun-control proposals, this fact is relevant to an assessment of the need for some form of self-protective search power.

Petitioner does not argue that a police officer should refrain from making any investigation of suspicious circumstances until such time as he has probable cause to make an arrest; nor does he deny that police officers in properly discharging their investigative function may find themselves confronting persons who might well be armed and dangerous. Moreover, he does not say that an officer is always unjustified in searching a suspect to discover weapons. Rather, he says it is unreasonable for the policeman to take that step until such time as the situation evolves to a point where there is probable cause to make an arrest. When that point has been reached, petitioner would concede the officer's right to conduct a search of the suspect for weapons, fruits or instrumentalities of the crime, or "mere" evidence, incident to the arrest.

There are two weaknesses in this line of reasoning, however. First, it fails to take account of traditional limitations upon the scope of searches, and thus recognizes no distinction in purpose, character, and extent between a search incident to an arrest and a limited search for weapons. The former, although justified in part by the acknowledged necessity to protect the arresting officer from assault with a concealed weapon, *Preston* v. *United States*, 376 U. S. 364, 367 (1964), is also justified on other grounds, *ibid.*, and can therefore involve a relatively extensive exploration of the person. A search for weapons in the absence of probable cause to arrest, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation. *Warden* v. *Hayden*, 387 U. S. 294, 310 (1967) (MR. JUSTICE FORTAS, concurring). Thus it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as

something less than a "full" search, even though it remains a serious intrusion.

A second, and related, objection to petitioner's argument is that it assumes that the law of arrest has already worked out the balance between the particular interests involved here—the neutralization of danger to the policeman in the investigative circumstance and the sanctity of the individual. But this is not so. An arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise quite different. An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows.[22] The protective search for weapons, on the other hand, constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person. It does not follow that because an officer may lawfully arrest a person only when he is apprised of facts sufficient to warrant a belief that the person has committed or is committing a crime, the officer is equally unjustified, absent that kind of evidence, in making any intrusions short of an arrest. Moreover, a perfectly reasonable apprehension of danger may arise long before the officer is possessed of adequate information to justify taking a person into custody for the purpose of prosecuting him for a crime. Petitioner's reliance on cases which have worked out standards of reasonableness with regard to "seizures" constituting arrests and searches incident thereto is thus misplaced. It assumes that the interests sought to be vindicated and the invasions of personal security may be equated in the

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[22] See generally W. LaFave, Arrest—The Decision to Take a Suspect into Custody 1–13 (1965).

two cases, and thereby ignores a vital aspect of the analysis of the reasonableness of particular types of conduct under the Fourth Amendment. See *Camara* v. *Municipal Court, supra.*

Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. Cf. *Beck* v. *Ohio*, 379 U. S. 89, 91 (1964); *Brinegar* v. *United States*, 338 U. S. 160, 174–176 (1949); *Stacey* v. *Emery*, 97 U. S. 642, 645 (1878).[23] And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or "hunch," but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience. Cf. *Brinegar* v. *United States supra.*

IV.

We must now examine the conduct of Officer McFadden in this case to determine whether his search and seizure of petitioner were reasonable, both at their inception and as conducted. He had observed Terry, together with Chilton and another man, acting in a manner he took to be preface to a "stick-up." We think on the facts and circumstances Officer McFadden detailed before the trial judge a reasonably prudent man would have been warranted in believing petitioner was armed

[23] See also cases cited in n. 18, *supra.*

and thus presented a threat to the officer's safety while he was investigating his suspicious behavior. The actions of Terry and Chilton were consistent with McFadden's hypothesis that these men were contemplating a daylight robbery—which, it is reasonable to assume, would be likely to involve the use of weapons—and nothing in their conduct from the time he first noticed them until the time he confronted them and identified himself as a police officer gave him sufficient reason to negate that hypothesis. Although the trio had departed the original scene, there was nothing to indicate abandonment of an intent to commit a robbery at some point. Thus, when Officer McFadden approached the three men gathered before the display window at Zucker's store he had observed enough to make it quite reasonable to fear that they were armed; and nothing in their response to his hailing them, identifying himself as a police officer, and asking their names served to dispel that reasonable belief. We cannot say his decision at that point to seize Terry and pat his clothing for weapons was the product of a volatile or inventive imagination, or was undertaken simply as an act of harassment; the record evidences the tempered act of a policeman who in the course of an investigation had to make a quick decision as to how to protect himself and others from possible danger, and took limited steps to do so.

The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all. The Fourth Amendment proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation. Compare *Katz* v. *United States*, 389 U. S. 347, 354–356 (1967). The entire deterrent purpose of the rule excluding evidence seized in violation of the Fourth Amendment rests on the assumption that "limitations upon the fruit to be gathered tend to limit the quest itself." *United States* v. *Poller*, 43 F. 2d

911, 914 (C. A. 2d Cir. 1930); see, *e. g., Linkletter* v. *Walker*, 381 U. S. 618, 629–635 (1965); *Mapp* v. *Ohio*, 367 U. S. 643 (1961); *Elkins* v. *United States*, 364 U. S. 206, 216–221 (1960). Thus, evidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation. *Warden* v. *Hayden*, 387 U. S. 294, 310 (1967) (MR. JUSTICE FORTAS, concurring).

We need not develop at length in this case, however, the limitations which the Fourth Amendment places upon a protective seizure and search for weapons. These limitations will have to be developed in the concrete factual circumstances of individual cases. See *Sibron* v. *New York*, *post*, p. —, decided today. Suffice it to note that such a search, unlike a search without a warrant incident to a lawful arrest, is not justified by any need to prevent the disappearance or destruction of evidence of crime. See *Preston* v. *United States*, 376 U. S. 364, 367 (1964). The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.

The scope of the search in this case presents no serious problem in light of these standards. Officer McFadden patted down the outer clothing of petitioner and his two companions. He did not place his hands in their pockets or under the outer surface of their garments until he had felt weapons, and then he merely reached for and removed the guns. He never did invade Katz's person beyond the outer surfaces of his clothes, since he discovered nothing in his pat down which might have been a weapon. Officer McFadden confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered

the weapons. He did not conduct a general exploratory search for whatever evidence of criminal activity he might find.

V.

We conclude that the revolver seized from Terry was properly admitted in evidence against him. At the time he seized petitioner and searched him for weapons, Officer McFadden had reasonable grounds to believe that petitioner was armed and dangerous, and it was necessary for the protection of himself and others to take swift measures to discover the true facts and neutralize the threat of harm if it materialized. The policeman carefully restricted his search to what was appropriate to the discovery of the particular items which he sought. Each case of this sort will, of course, have to be decided on its own facts. We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous; where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries; and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken.

Affirmed.

MR. JUSTICE BLACK concurs in the judgment and the opinion except where the opinion quotes from and relies upon this Court's opinion in *Katz* v. *United States* and the concurring opinion in *Warden* v. *Hayden*.

SUPREME COURT OF THE UNITED STATES

No. 67.—October Term, 1967.

John W. Terry, Petitioner, v. State of Ohio. | On Writ of Certiorari to the Supreme Court of Ohio.

[June 10, 1968.]

Mr. Justice Harlan, concurring.

While I unreservedly agree with the Court's ultimate holding in this case, I am constrained to fill in a few gaps, as I see them, in its opinion. I do this because what is said by this Court today will serve as initial guidelines for law enforcement authorities and courts throughout the land as this important new field of law develops.

A police officer's right to make an on-the-street "stop" and an accompanying "frisk" for weapons is of course bounded by the protections afforded by the Fourth and Fourteenth Amendments. The Court holds, and I agree, that while the right does not depend upon possession by the officer of a valid warrant, nor upon the existence of probable cause, such activities must be reasonable under the circumstances as the officer credibly relates them in court. Since the question in this and most cases is whether evidence produced by a frisk is admissible, the problem is to determine what makes a frisk reasonable.

If the State of Ohio were to provide that police officers could, on articulable suspicion less than probable cause, forcibly frisk and disarm persons thought to be carrying concealed weapons, I would have little doubt that action taken pursuant to such authority could be constitutionally reasonable. Concealed weapons create an immediate and severe danger to the public, and though

that danger might not warrant routine general weapons checks, it could well warrant action on less than a "probability." I mention this line of analysis because I think it vital to point out that it cannot be applied in this case. On the record before us Ohio has not clothed its policemen with routine authority to frisk and disarm on suspicion; in the absence of state authority, policemen have no more right to "pat down" the outer clothing of passers-by, or of persons to whom they address casual questions, than does any other citizen. Consequently, the Ohio courts did not rest the constitutionality of this frisk upon any general authority in Officer McFadden to take reasonable steps to protect the citizenry, including himself, from dangerous weapons.

The state courts held, instead, that when an officer is lawfully confronting a possibly hostile person in the line of duty he has a right, springing only from the necessity of the situation and not from any broader right to disarm, to frisk for his own protection. This holding, with which I agree and with which I think the Court agrees, offers the only satisfactory basis I can think of for affirming this conviction. The holding has, however, two logical corollaries that I do not think the Court has fully expressed.

In the first place, if the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a *forcible* stop. Any person, including a policeman, is at liberty to avoid a person he considers dangerous. If and when a policeman has a right instead to disarm such a person for his own protection, he must first have a right not to avoid him but to be in his presence. That right must be more than the liberty (again, possessed by every citizen) to address questions to other persons, for ordinarily the person

addressed has an equal right to ignore his interrogator and walk away; he certainly need not submit to a frisk for the questioner's protection. I would make it perfectly clear that the right to frisk in this case depends upon the reasonableness of a forcible stop to investigate a suspected crime.

Where such a stop is reasonable, however, the right to frisk must be immediate and automatic if the reason for the stop is, as here, an articulable suspicion of a crime of violence. Just as a full search incident to a lawful arrest requires no additional justification, a limited frisk incident to a lawful stop must often be rapid and routine. There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet.

The facts of this case are illustrative of a proper stop and an incident frisk. Officer McFadden had no probable cause to arrest Terry for anything, but he had observed circumstances that would reasonably lead an experienced, prudent policeman to suspect that Terry was about to engage in burglary or robbery. His justifiable suspicion afforded a proper constitutional basis for accosting Terry, restraining his liberty of movement briefly, and addressing questions to him, and Officer McFadden did so. When he did, he had no reason whatever to suppose that Terry might be armed, apart from the fact that he suspected him of planning a violent crime. McFadden asked Terry his name, to which Terry "mumbled something." Whereupon McFadden, without asking Terry to speak louder and without giving him any chance to explain his presence or his actions, forcibly frisked him.

I would affirm this conviction for what I believe to be the same reasons the Court relies on. I would, however,

make explicit what I think is implicit in affirmance on the present facts. Officer McFadden's right to interrupt Terry's freedom of movement and invade his privacy arose only because circumstances warranted forcing an encounter with Terry in an effort to prevent or investigate a crime. Once that forced encounter was justified, however, the officer's right to take suitable measures for his own safety followed automatically.

Upon the foregoing premises, I join the opinion of the Court.

SUPREME COURT OF THE UNITED STATES

No. 67.—October Term, 1967.

John W. Terry, Petitioner, v. State of Ohio. | On Writ of Certiorari to the Supreme Court of Ohio.

[June 10, 1968.]

Mr. Justice White, concurring.

I join the opinion of the Court, reserving judgment, however, on some of the Court's general remarks about the scope and purpose of the exclusionary rule which the Court has fashioned in the process of enforcing the Fourth Amendment.

Also, although the Court puts the matter aside in the context of this case, I think an additional word is in order concerning the matter of interrogation during an investigative stop. There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation. In my view, it is temporary detention, warranted by the circumstances, which chiefly justifies the protective frisk for weapons. Perhaps the frisk itself, where proper, will have beneficial results whether questions are asked or not. If weapons are found, an arrest will fol-

low. If none are found, the frisk may nevertheless serve preventive ends because of its unmistakable message that suspicion has been aroused. But if the investigative stop is sustainable at all, constitutional rights are not necessarily violated if pertinent questions are asked and the person is restrained briefly in the process.

SUPREME COURT OF THE UNITED STATES

No. 67.—October Term, 1967.

John W. Terry, Petitioner, *v.* State of Ohio.	On Writ of Certiorari to the Supreme Court of Ohio.

[June 10, 1968.]

Mr. Justice Douglas, dissenting.

I agree that petitioner was "seized" within the meaning of the Fourth Amendment. I also agree that frisking petitioner and his companions for guns was a "search." But it is a mystery how that "search" and that "seizure" can be constitutional by Fourth Amendment standards, unless there was "probable cause" [1] to believe that (1) a crime had been committed or (2) a crime was in the process of being committed or (3) a crime was about to be committed.

[1] The meaning of "probable cause" has been developed in cases where an officer has reasonable grounds to believe that a crime has been or is being committed. See, *e. g.*, *The Thompson*, 3 Wall. 155; *Stacey* v. *Emery*, 97 U. S. 642; *Director General* v. *Kastenbaum*, 263 U. S. 25; *Carroll* v. *United States*, 267 U. S. 132; *United States* v. *Di Re*, 332 U. S. 581; *Brinegar* v. *United States*, 338 U. S. 160; *Draper* v. *United States*, 358 U. S. 307; *Henry* v. *United States*, 361 U. S. 98. In such cases, of course, the officer may make an "arrest" which results in charging the individual with commission of a crime. But while arresting persons who have already committed crimes is an important task of law enforcement, an equally if not more important function is crime prevention and deterrence of would-be criminals. "[T]here is no war between the Constitution and common sense," *Mapp* v. *Ohio*, 367 U. S. 643, 647. Police officers need not wait until they see a person actually commit a crime before they are able to "seize" that person. Respect for our constitutional system and personal liberty demands in return, however, that such a "seizure" be made only upon "probable cause."

The opinion of the Court disclaims the existence of "probable cause." If loitering were an issue and that was the offense charged, there would be "probable cause" shown. But the crime here is carrying concealed weapons; [2] and there is no basis for concluding that the officer had "probable cause" for believing that crime was being committed. Had a warrant been sought, a magistrate would, therefore, have been unauthorized to issue one, for he can act only if there is a showing of "probable cause." We hold today that the police have greater authority to make a "seizure" and conduct a "search" than a judge has to authorize such action. We have said precisely the opposite over and over again.[3]

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[2] 29 Page's Ohio Rev. Code § 2923.01.

[3] This Court has always used the language of "probable cause" in determining the constitutionality of an arrest without a warrant. See, *e. g.*, *Carroll* v. *United States*, 261 U. S. 132, 156, 161–162; *Johnson* v. *United States*, 333 U. S. 10, 13–15; *McDonald* v. *United States*, 335 U. S. 451, 455–456; *Henry* v. *United States*, 361 U. S. 98; *Wong Sun* v. *United States*, 371 U. S. 471, 479–484. To give power to the police to seize a person on some grounds different from or less than "probable cause" would be handing them *more* authority than could be exercised by a magistrate in issuing a warrant to seize a person. As we stated in *Wong Sun* v. *United States*, 371 U. S. 471, with respect to requirements for arrests without warrants: "Whether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained." *Id.*, at 479. And we said in *Brinegar* v. *United States*, 338 U. S. 160, 176:

"These long-prevailing standards [for probable cause] seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical,

In other words, police officers, up to today have been permitted to effect arrests or searches without warrants only when the facts within their personal knowledge would satisfy the constitutional standard of *probable cause*. At the time of their "seizure" without a warrant they must possess facts concerning the person arrested that would have satisfied a magistrate that "probable cause" was indeed present. The term "probable cause" rings a bell of certainty that is not sounded by phrases such as "reasonable suspicion." Moreover, the meaning of "probable cause" is deeply imbedded in our constitutional history. As we stated in *Henry* v. *United States*, 361 U. S. 98, 100–102:

> "The requirement of probable cause has roots that are deep in our history. The general warrant, in which the name of the person to be arrested was left blank, and the writs of assistance, against which James Otis inveighed, both perpetuated the oppressive practice of allowing the police to arrest and search on suspicion. Police control took the place of judicial control, since no showing of 'probable cause' before a magistrate was required.
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> . . . . .
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> "That philosophy [rebelling against these practices] later was reflected in the Fourth Amendment. And as the early American decisions both before and immediately after its adoption show, common rumor or report, suspicion, or even 'strong reason to suspect' was not adequate to support a warrant

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nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice."

And see *Johnson* v. *United States*, 333 U. S. 10, 14–15; *Wrightson* v. *United States*, 222 F. 2d 556, 559–560 (C. A. D. C. Cir. 1955).

for arrest. And that principle has survived to this day.

> "It is important, we think, that this requirement [of probable cause] be strictly enforced, for the standard set by the Constitution protects both the officer and the citizen. If the officer acts with probable cause, he is protected even though it turns out that the citizen is innocent . . . . And while a search without a warrant is, within limits, permissible if incident to a lawful arrest, if an arrest without a warrant is to support an incidental search, it must be made with probable cause . . . . This immunity of officers cannot fairly be enlarged without jeopardizing the privacy or security of the citizen."

The infringement on personal liberty of any "seizure" of a person can only be "reasonable" under the Fourth Amendment if we require the police to possess "probable cause" before they seize him. Only that line draws a meaningful distinction between an officer's mere inkling and the presence of facts within the officer's personal knowledge which would convince a reasonable man that the person seized has committed, is committing, or is about to commit a particular crime. "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of every-day life on which reasonable and prudent men, not legal technicians, act." *Brinegar* v. *United States,* 338 U. S. 160, 175.

To give the police greater power than a magistrate is to take a long step down the totalitarian path. Perhaps such a step is desirable to cope with modern forms of lawlessness. But if it is taken, it should be the deliberate choice of the people through a constitutional amendment.

Until the Fourth Amendment, which is closely allied with the Fifth,[4] is rewritten, the person and the effects of the individual are beyond the reach of all government agencies until there are reasonable grounds to believe (probable cause) that a criminal venture has been launched or is about to be launched.

There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today.

Yet if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his gib, if they can "seize" and "search" him in their discretion, we enter a new regime. The decision to enter it should be made only after a full debate by the people of this country.

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[4] See *Boyd* v. *United States*, 116 U. S. 616, 633:

"For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of of the Fourth Amendment."